Hastings Law Journal

Volume 58 | Issue 4 Article 2

1-2007

Regulating Land Use in a Constitution Shadow: The Institutional Contexts of Exactions

Mark Fenster

Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions

MARK FENSTER*

INTRODUCTION

The regulatory takings doctrine, the Supreme Court declared in *Lingle v. Chevron*, concerns the effects of a regulation on the incidents of property ownership.[1] It serves as a constitutional protection against regulations that impose the functional equivalent to a classic taking of private property (an appropriation by the state or an ouster), and it requires compensation for owners who are subject to such regulations.[2] Just as significant as declaring what the regulatory takings doctrine *is*, the Court in *Lingle* also declared what it *is not*: it is not a judicial check on the validity or reasonableness of a regulation that effects a taking.[3] While the Takings Clause[4] serves to correct an unfair outcome due to government regulation, it does not authorize substantive judicial review of government's discretionary decision to regulate.[5]

In the same term that the Court explained the Takings Clause in this apparently coherent manner,[6] it also took a backward glance at its

* Associate Professor, Levin College of Law, University of Florida. Many thanks to excellent research assistance from Robert Bowser, Amanda Harrison, and especially Kate Dozark and Leslie Utiger. Summer research funding provided by the Levin College of Law helped enable the completion of this project.

1. *See* 544 U.S. 528, 537 (2005).

2. *Id.* at 536–37.

3. *Id.* at 542–45.

4. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

5. *See infra* text accompanying notes 143–49. The Takings Clause incidentally limits governmental discretion to affect property in particular ways, but this is a secondary issue. The Takings Clause does not directly affect the government's authority to regulate; it merely requires that once the regulation has particular effects, the government must compensate for the losses associated with those effects. *See id.*

6. "Apparently coherent," that is, insofar as it can be, considering the doctrine's prior manifest incoherence—one which the Court recognized a generation ago, at the beginning of the modern era of regulatory takings, and which has persisted to the present. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–24 (1978) (noting that identifying a regulatory taking "has proved to be a

"exactions" jurisprudence.[7] This glance was revealing for what it showed about the Court's relative deference to the web of government institutions that shape land use regulation on the ground. A product of its two earlier decisions in *Nollan v. California Coastal Commission*[8] and *Dolan v. City of Tigard*,[9] the Court's exactions rules limit what a regulatory agency (typically a local government) engaged in land use control can exact from a property owner as a condition for development.[10] Put briefly, the Court's holdings in those decisions restricted governments to conditions, or "exactions," that have an "essential nexus" to the harm expected from the proposed development,[11] and that create a burden on the property owner that is in "rough proportionality" to that harm.[12] An exaction that fails to meet either of these tests requires the government to compensate the property owner for the property that the exaction has taken.[13] *Nollan* and *Dolan* thereby limit and channel the regulatory discretion of local governments, acting as an external check on a land use planning process that a majority of the justices considered prone to exploitation.[14]

The exactions decisions sit uneasily alongside the Court's recent effort in *Lingle* to make sense of its long, confusing line of takings

problem of considerable difficulty"); Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 97 n.2 (2002) (citing the extensive law review literature complaining of the doctrine's incoherence).

7. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005). In this Article, I will use the general term "exactions" to refer to all conditions on development, including the dedication of land, fees in lieu of dedication, or impact fees. I will occasionally use the term "impact fee" to refer to a type of exaction: monetary conditions on development intended to address directly a particular anticipated impact from the proposed development. *See also infra* note 34 (listing and explaining other types of exactions). But because this article concerns the Supreme Court's broad, abstract approach to development conditions, I will generally use the term "exaction" rather than confuse the constitutional issue with more precise regulatory terminology.

8. 483 U.S. 825, 837 (1987).

9. 512 U.S. 374, 386 (1994).

10. By "exactions rules" I mean that *Nollan* and *Dolan* were efforts to impose clear and stable rule-formalist constraints on lower courts and local governments. *See* Mark Fenster, *Takings Formalism, Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 629–35 (2004); *cf.* JIM ROSSI, REGULATORY BARGAINING AND PUBLIC LAW 107–09 (2005) (praising *Nollan* and *Dolan* for bringing certainty to regulatory process through their use of more precise formal rules than the balancing standards that dominate takings jurisprudence).

11. *Nollan*, 483 U.S. at 837.

12. *Dolan*, 512 U.S. at 391.

13. *Id.* at 396; *Nollan*, 483 U.S. at 831.

14. The Court's concern about local government overreaching in the planning process was clearest when Justice Scalia, in his *Nollan* decision, characterized any exaction that failed to advance the police powers objectives the government sought to further as "an out-and-out plan of extortion"—a characterization that Chief Justice Rehnquist repeated in *Dolan*. *Nollan*, 483 U.S. at 837 (citation and internal quotation marks omitted); *Dolan*, 512 U.S. at 387 (citation and internal quotation marks omitted). *See generally* Lee Ann Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 15 (2000) (noting the Court's skepticism about local governmental regulation in its exactions decisions).

decisions. *Nollan* and *Dolan* look to the particular effect that a condition will have on a property owner, and in that regard are consistent with the Court's takings jurisprudence.[15] On the other hand, *Nollan* and *Dolan* allow courts to consider the validity of the relationship between the condition and the government's stated regulatory purpose.[16] They therefore mandate judicial review of a local government's substantive regulatory practice, as well as of the justification that local officials use to explain the regulation. It is no wonder, then, that Justice O'Connor attempted to reconcile the Court's emergent takings theory with its exactions decisions in *Lingle*.[17] The exactions decisions, she asserted, are no more than a limited check on governmental efforts to impose, via a regulatory condition, a confiscatory or functionally equivalent taking of property without compensation in an individualized regulatory act.[18] Accordingly, under the unconstitutional conditions doctrine, when the government has taken land without compensation, judicial review must check the relationship between the taking and the government's stated regulatory need.[19] *Nollan* and *Dolan*, in this explanation, apply to a limited universe of potential exactions. When they do not apply, courts review a challenged exaction using some lower level of scrutiny: either the Court's own ad hoc, multi-factor balancing test from *Penn Central Transportation Co. v. City of New York*,[20] or, more likely, an exactions-specific test developed by state courts under state law.[21]

If only this explanation ended the saga. Because *Lingle*'s entire discussion of *Nollan* and *Dolan* could be dismissed as non-binding dicta,[22] and because the Court refused to provide further and more explicit clarity despite its opportunity to do so in a case for which it accepted review of another, separate takings question,[23] some of the precise boundaries and implications of the exactions decisions remain uncertain. The Court's exactions rules check government discretion only selectively, while leaving it up to other governmental institutions, as well as to developers, homeowners, voters, and the market for local governments' packages of taxes and services, to check discretion over exactions to which *Nollan* and *Dolan* do not apply. For many commentators, and

15. *See Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

16. *See Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

17. *See* Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 545–48 (2005).

18. *Id.* at 546–47.

19. *Id.* at 547–48.

20. 438 U.S. 104, 124 (1978). *Lingle* made plain that when a special category did not exist, the *Penn Central* analysis applies. *Lingle*, 544 U.S. at 538–40.

21. See *infra* text accompanying notes 45–46, 200–04 (describing different levels of scrutiny applied by state courts under state law).

22. *See infra* text accompanying notes 165–67.

23. *See infra* Part III.A (discussing the questions presented in the petition for certiorari in *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005)).

even for some justices, this unevenness and confusion are untenable: heightened scrutiny should apply either to all exactions or to none.[24]

This Article argues that *Lingle* affirms and justifies this unevenness—even though its explanation may frustrate both property rights advocates and planning advocates, who view the Court's exactions jurisprudence as either an inadequate or an onerous effort to limit local discretion. *Lingle* marks the Court's ultimate shift in its regulatory takings jurisprudence toward viewing the Takings Clause as a constitutional command to respect institutional competence. It focuses on the question of *who* should decide the limits of a regulatory burden on property rights, rather than on the substantive issue of *what* a federal constitutional definition of property rights should be, and it affirms the passive virtue of deference.[25] It thus clarifies that the Takings Clause serves as a shield for property owners only in those limited instances in which a regulatory agency imposes certain types of exactions in certain ways, thereby confiscating land in a manner that is highly suspect. This appears to leave local governments with a significant degree of discretion outside of those instances when confiscatory exactions are most likely to be imposed. But *other* institutions, most prominently state legislatures and courts, can limit local discretion. And they do—even more so now, since exactions have become more widely used as a regulatory tool.[26] Ultimately, in its relatively late arrival to exactions and its uneven efforts to police them, the Court has contributed to a complicated web of institutional restraints on local government. *Lingle* affirms that the Takings Clause fills only a minimal role, though an occasionally powerful one, in this web of institutions that oversee or otherwise limit local discretion.

This Article seeks not to praise *Nollan* and *Dolan*, nor to revere *Lingle*'s efforts to clarify those earlier decisions' limits. The exactions decisions are conceptually, normatively, and consequentially unsatisfactory,[27] while *Lingle* itself improves upon and clarifies, but does not fully resolve, many of the doctrinal and regulatory messes the Court has created in the last three decades of its regulatory takings decisions. Rather, this Article explains *Lingle*, and the web of institutional

24. *Compare* J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373, 397–401 (2002) (arguing that *Nollan* and *Dolan*'s heightened scrutiny should apply to all exactions), *with* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1607–09 (1988) (arguing that, read narrowly, *Nollan* does not create a special category of heightened scrutiny for exactions, but merely extends the longstanding compensation requirement for unconditional permanent physical occupations to occupations that are imposed conditionally).

25. *See* Mark Fenster, *Takings, Version 2005: The Legal Process of Constitutional Property Rights*, 9 U. PENN. J. CON. L. (forthcoming 2007).

26. *See infra* Parts IV.A–C.

27. *See infra* Part II.C.

restraints on exactions that it invokes, as an imperfect but ultimately satisfactory solution to controlling local discretion in a post-*Nollan* and -*Dolan* world. *Lingle* signals both that lower courts should limit *Nollan* and *Dolan*'s application and that other levels of government, acting outside the control of the Court's exactions rules, but within the shadow they cast, can limit—and indeed, frequently have limited—municipalities' discretion to impose exactions.[28]

Parts I and II of this Article describe exactions and the judicial review of exactions prior to the 2004 Term. This history has already been described extensively;[29] my purpose in these two parts is to focus upon how exactions work as a means to exercise regulatory discretion and how judicial review acts as one means to limit and channel that discretion. After describing the rise of exactions in land use regulation, Part I concludes that exactions are appreciably less than perfect but are nevertheless necessary as a regulatory tool that enables the granting of entitlements to develop land while forcing at least some cost internalization as a condition of those entitlements. Part II summarizes *Nollan* and *Dolan* and concludes that these decisions are also appreciably less than perfect but may be necessary as a means to protect landowners from oppressive conditions imposed by local governments. Part III explains what the Court did and did not say about exactions in its 2004 Term. Part IV attempts both to make sense of the Court's actions and to justify the limitations the Court has placed on *Nollan* and *Dolan*'s application, by describing other institutions and legal authorities that can check local discretion.

I. EXACTIONS, PRE-2005: THE RISE OF REGULATORY DISCRETION

A. EXACTIONS AND THE EMERGENCE OF LOCAL ADMINISTRATIVE DISCRETION

When owners seek to subdivide their parcels, initiate major construction projects, or intensify the use of their land, they typically must seek one or more discretionary approvals from the jurisdiction's zoning authority or legislative body.[30] The exercise of governmental

28. *See infra* Part IV.A.

29. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 341–51 (1995); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991); David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243 (1997); Fennell, *supra* note 14; Fenster, *supra* note 10; Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177 (2006).

30. *See* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBÁÑEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 54–55 (1993); Daniel J. Curtin, Jr., *How the West Was Won: Takings and Exactions—California Style*, *in* TRENDS IN LAND USE LAW FROM A TO Z 193, 225–26 (Patricia E. Salkin ed., 2001).

discretion at the approval stage was not originally part of the "Euclidean" approach to zoning, which relied upon static zoning maps and ordinances either to authorize as a matter of right or ban entirely certain types of land uses in certain identified areas.[31] In contemporary practice, however, local governments typically retain some degree of discretion in their comprehensive plans and zoning ordinances to approve or reject proposals from developers and property owners.[32]

Over the past three decades,[33] exactions have served as a flexible regulatory tool that government authorities use as a condition for issuing approvals, especially in fast-growing communities.[34] Exactions require property owners to provide some entitlement, promise, or fee that serves a public need and is related in some way to the expected external costs to the community of the owner's new use of her land.[35] If the property owner refuses, the local government can reject the development proposal under its police power authority—subject to liability, of course, for any violation of constitutional or state law. In this way, exactions are, in William Fischel's words, "payments for permissions that can be withheld."[36] In the process of imposing exactions, a local government may apply a pre-existing set of criteria or formulas to the property owner's proposal in order to derive the exactions it will require, or it may negotiate with the property owner over the types and extent of exactions

31. *See* Ira Michael Heyman, *Legal Assaults on Municipal Land Use Regulation*, 5 URB. LAW. 1, 2 (1973), *reprinted in* THE LAND USE AWAKENING: ZONING LAW IN THE SEVENTIES 51–52 (Robert H. Freilich & Eric O. Stuhler eds., 1981); AM. PLANNING ASS'N, PLANNING ADVISORY SERVICE REPORT NO. 491/492, A GLOSSARY OF ZONING, DEVELOPMENT, AND PLANNING TERMS 94 (Fay Dolnick & Michael Davidson eds., 1999) ("Euclidean zoning").

32. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 86, 90–92 (3d ed. 2005).

33. One could date exactions to the imposition of subdivision controls that began in the early years of zoning and especially in the post-Depression era, when local governments, which had been saddled with poorly planned and financed subdivisions after the collapse of the 1920s land boom, began to require new development to provide at least parts of the infrastructure it would need. *See* Rosenberg, *supra* note 29, at 198–204. But their prevalence has grown dramatically during the post-war suburban boom period, as has the scope of projected costs they have been used to offset. *See id.* at 206–09.

34. *See* Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 139, 142 (2005). The term "exactions" includes, among other types, the dedication of land for the siting of public services or amenities (such as schools or parks), fees in lieu of dedication, impact fees to fund the provision of public services, and linkages, off-site development impact exactions intended to address effects linked to an approved development, such as the increased need for affordable housing that might result from commercial and/or office development. *See* Been, *supra* note 29, at 479–81; Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 FLA. L. REV. 835, 842–53 (1993); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 524 (1988).

35. *See* MICHAEL J. MESHENBERG, THE ADMINISTRATION OF FLEXIBLE ZONING TECHNIQUES 3–4 (American Society of Planning Officials Planning Advisory Service Report No. 318, 1976); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 839, 879–80 (1983).

36. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 6 (2001).

it will impose.[37] By using exactions to require financial or in-kind provision of infrastructure that will at a minimum remedy the proposed project's anticipated negative impacts, local governments have sought to shift to new development the infrastructural and service costs that such development would otherwise create—costs that would otherwise fall to the municipalities (and, in turn, to existing residents).[38]

Exactions, in short, are key regulatory tools in a localized, discretionary regime in which elected and appointed government officials wield significant power over one of the key political, social, and fiscal issues facing local government: land development.[39] The American model of governance views such administrative discretion with great skepticism, and vests the authority to exercise such discretion only with structural and formal constraints.[40] Such constraints range from the checks and balances of the tri-partite federal system, and the limited authority that local governments enjoy as subsidiary agents of the states that create them, to the substantive and procedural constraints placed on governmental authorities by constitutional and statutory texts.[41] Unsurprisingly, then, long before the Supreme Court jumped into the fray in *Nollan* and *Dolan*, other levels of government had sought to

37. *See* DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 160–63 (2d ed. 2004).

38. *See* ALTSHULER & GOMEZ-IBÁÑEZ, *supra* note 30, at 7, 62–63, 77, 95–96. On the growing infrastructural deficit and financial crunch that local governments face, and the limited alternatives to exactions that they have, see *id.* at 17, 23–26; Paul P. Downing & Thomas S. McCaleb, *The Economics of Development Exactions*, *in* DEVELOPMENT EXACTIONS 43, 44–50 (James E. Frank & Robert M. Rhodes eds., 1987); Rosenberg, *supra* note 29, at 183–91. On the "fiscalization" of land use decisions generally, see Jonathan Schwartz, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183 (1997).

39. *See* Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 95 (1990). The near-autonomy of local governments in the administration of land use in their jurisdictions, and the significance of land use regulation to local governance, has largely withstood efforts by state government to rein in local control. *See* DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES 33–35 (2003).

40. On the history of limits on federal agency discretion, see generally MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960, at 213–46 (1992) (detailing the development of a proceduralist administrative law to check administrative agencies); G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 94–127 (2000) (detailing the debates over the constitutional checks on the emergent federal administrative state in the early twentieth century). On the history of limits placed on local government discretion by state government, see generally GERALD FRUG, CITY MAKING 45–50 (1999); BERMAN, *supra* note 26, at 144–47. On the complicated relationship between the federal government and local governments, including the underlying constitutional issue of federalism, see David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001); Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. (forthcoming 2007).

41. *See generally* BERMAN, *supra* note 26; FRUG, *supra* note 40, at 45–50; HORWITZ, *supra* note 40, at 213–46 (detailing the development of a proceduralist administrative law to check administrative agencies); WHITE, *supra* note 40, at 94–127 (detailing the debates over the constitutional checks on the emergent federal administrative state in the early twentieth century).

check municipal discretion to impose exactions.[42] This occurred both implicitly, through state court decisions holding that local governments lacked sufficient authority to set such conditions on development or that the conditions violated an applicable state constitutional provision,[43] and explicitly, through state statutes that authorized but set limits on such conditions.[44] Prior to *Nollan*, state courts had relied upon their own state constitutional, statutory, and common law doctrines to develop various standards of review for land use exactions; some of those imposed a form of heightened, or even strict, scrutiny on exactions, while others were far more deferential.[45] Indeed, the Supreme Court claimed to base its rough proportionality test in *Dolan* on what it found to be the most reasonable of the state court precedents.[46]

B. THE IMPERFECTIONS OF EXACTIONS

As a regulatory tool, exactions promise an efficient means to force new development to "pay its own way" by internalizing its anticipated external costs.[47] Exactions thereby appear to represent an exemplary tool of "smart growth," insofar as they enable an expansion of residential housing supply at its true cost without burdening the existing community.[48] In theory, if an omniscient, omnipotent, and fair local government could design and implement perfect conditions on

---

42. *See* R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 9–19 (1987).

43. *See, e.g.*, City of Montgomery v. Crossroads Land Co., Inc., 355 So. 2d 363, 364–65 (Ala. 1978) (invalidating as beyond statutory authority fees imposed in lieu of park land dedication); Haugen v. Gleason, 359 P.2d 108, 111 (Or. 1961) (invalidating fee imposed on residential developers in lieu of park land dedication because failure of ordinance to limit use of funds to benefit made the fee a tax, which the county had no statutory authority to impose); John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 146 n.49 (1987) (citing cases in which courts invalidated exactions for lack of statutory authority).

44. *See* Delaney et al., *supra* note 43, at 146.

45. *See id.* at 146–56 (summarizing differing state approaches pre-*Nollan*).

46. *See* Dolan v. City of Tigard, 512 U.S. 374, 389–91 (1994) (summarizing various state approaches to the relationship between the exaction and the proposed development). *But see* Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use After* Dolan*: Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW. 401, 415–16 (1996) (arguing that Court misread many of the state court decisions it summarized in *Dolan*).

47. *See, e.g.*, ALTSHULER & GOMEZ-IBÁÑEZ, *supra* note 30, at 3–4; Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 52 (1987); Stewart E. Sterk, *Competition Among Municipalities As a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 832 (1992); Edward J. Sullivan & Isa Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 URB. LAW. 53, 61 (2005).

48. *See* J. Celeste Sakowicz, *Urban Sprawl: Florida's and Maryland's Approaches*, 19 J. LAND USE & ENVTL. L. 377, 395–96 (2003); Samuel R. Staley, *Reforming the Zoning Laws*, in A GUIDE TO SMART GROWTH: SHATTERING MYTHS, PROVIDING SOLUTIONS 61, 73 (Jane S. Shaw & Ronald D. Utt eds., 2000); Michael Allan Wolf, *Earning Deference: Reflections on the Merger of Environmental and Land-Use Law*, 20 PACE ENVTL. L. REV. 253, 263 (2002).

development, the resulting regulatory acts would be models of efficiency, achieved with minimal administrative costs and easily passing the nexus and proportionality tests.[49] These hyper-efficient exactions would be so perfect, in fact, that they likely would garner a broad democratic consensus among the citizenry. After all, the new development would simultaneously increase the local tax base and reveal a welcoming, inclusive community, all without imposing any burden on the citizenry.

But of course local governments are neither omniscient nor omnipotent.[50] They rely on imperfect information and guesswork about the expected externalized costs of development—albeit expensive, professionally derived information and guesswork—to impose exactions that are inevitably imperfect.[51] Nor do exactions capture the full range of impacts for new development, as non-omnipotent local governments frequently either shy away from imposing full-cost exactions or are barred from doing so by their state legislatures.[52] Exactions focus almost entirely on infrastructure and are only rarely used to consider socio-economic issues such as housing and employment needs that comprehensive planning otherwise considers.[53] And where inexpert and lenient exactions appear to give a relatively free pass to developers that have captured the local government's regulatory process, exactions can appear to encourage weak, potentially corrupt bargains that enable development while passing its costs onto the community.[54]

---

49. *See* Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1732–36 (1988) (positing that a sufficiently comprehensive exaction program could be efficient). On the omniscient model in land use planning, see Neil Komesar, *Housing, Zoning, and the Public Interest*, *in* PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 218, 220–21 (Burton A. Weisbrod ed., 1978).

50. *See* Sterk, *supra* note 49, at 1738–42.

51. *See* DANIEL POLLAK, CALIFORNIA RESEARCH BUREAU, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? 124–29 (2000); Fenster, *supra* note 10, at 644.

52. *See* POLLAK, *supra* note 51, at 23–25; Jonathan M. Davidson et al., *"Where's* Dolan*?": Exactions Law in 1998*, 30 URB. LAW. 683, 697 (1998); Fenster, *supra* note 10, at 654–61; Laurie Reynolds & Carlos A. Ball, *Exactions and the Privatization of the Public Sphere*, 21 J.L. & POL. 451, 471 (2005). For example, the city of Albuquerque, New Mexico, due to developers' opposition, waited nearly a decade after receiving statutory authority to impose impact fees to adopt a formula for their use. *See* Anita P. Miller, *New Mexico Development Impact Fees*, *in* DEVELOPMENT IMPACT FEES IN THE ROCKY MOUNTAIN REGION 57, 67 (J. Bart Johnson & James van Hemert eds., 2d ed. 2005). Moreover, even presuming the possibility of perfect information and a willing and powerful government, a "perfect" exaction presumes a universally recognizable community baseline from which new development's costs are taking the community and to which exactions will return the community. *See* Fennell, *supra* note 14, at 64–65.

53. *See* Julian Conrad Juergensmeyer, *The Legal Issues of Capital Facilities Funding*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES 51, 63 (Rachelle Alterman ed., 1988).

54. On the problems of bias, capture, and corruption in the land use process, see ELLICKSON & BEEN, *supra* note 32, at 364–68; Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 86–89 (1994). In the period prior to the widespread delegation to local governments of authority to impose exactions, courts frequently struck down as illegal "contract zoning" those land

Exactions also create distributional inequities. Some commentators and economists have asserted that the costs of exactions, once passed along to new homeowners, make housing less affordable to those who can least afford it.[55] However, the evidence about the relationship between impact fees and housing costs is mixed.[56] Exactions can also make the local allocation of resources more unequal. In fact, exactions are popular with local governments because they produce non-tax revenue that can finance capital construction and public services at a time when municipalities with limited taxing authority face increasing fiscal obligations.[57] Local governments' reliance on exactions to finance infrastructure and services has helped transform municipalities into quasi-private, pay-as-you-go service providers. As a result, new services and infrastructure go disproportionately to those who can afford them; those who would depend upon the allocation of general tax revenues for the provision of public facilities and services, and those who cannot afford the incremental costs required to pay for them, ultimately receive less.[58] Local government that bases its allocation decisions increasingly on putatively unbiased, scientific efforts to internalize external costs becomes less participatory and less interested in furthering the principles of collective, community-based decision-making that proponents of democratic cities advocate.[59]

Nor are local governments always fair in their dealings with their citizens, much less with outsiders to whom they have little incentive to be fair. The well-known, general critiques of local government as majoritarian, factional, and exclusive are common rebuttals to the progressive and civic republican ideal of a rational, deliberative local government.[60] These critiques attack exactions as inefficient because they

---

use bargains that manifested excessive agency capture or corruption. *See* Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 977–94 (1987).

55. *See, e.g.*, ALTSHULER & GOMEZ-IBÁÑEZ, *supra* note 30, at 107, 135.

56. *See* Arthur C. Nelson, *Development Impact Fees: The Next Generation*, *in* EXACTIONS, IMPACT FEES AND DEDICATIONS 87, 93–94 (Robert H. Freilich & David W. Bushek eds., 1995).

57. *See* Reynolds & Ball, *supra* note 52, at 458–59.

58. *See id.* at 456.

59. *See* Gerald E. Frug, *City Services*, 73 N.Y.U. L. REV. 23, 35–45 (1998). In this respect, criticism of the putatively unbiased efforts to impose cost-benefit analysis on environmental law applies to exactions as well. *See* David M. Driesen, *Is Cost-Benefit Analysis Neutral?*, 77 U. COLO. L. REV. 335, 384–85 (2006) (finding that the use of putatively "neutral" cost-benefit analysis in environmental regulation can in fact demonstrate significant anti-regulatory bias).

60. *See* RICHARD A. EPSTEIN, TAKINGS 104 (1985) (advocating strict application of Takings Clause because without compensation requirement, regulation of property inevitably leads to government rent-seeking behavior); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 706–11, 761–79 (1973) (identifying "fundamental weaknesses" in zoning, and proposing development of a "more privatized system of land use regulation"); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, *in* THE VOLUNTARY CITY: CHOICE,

not only add to the cost of housing, but also force development to outlying suburbs and exurbs that impose fewer regulations, thereby creating "leapfrog" development and sprawl.[61] Critics also condemn exactions as an extortionate tool in an already burdensome land use planning process that results in a regulatory program that enables local governments to withhold valuable entitlements from individual developers and property owners unless the latter groups are willing to "exchange" outrageous and unfair fees or demands for the dedication of land.[62] This extortion, in turn, makes new development more expensive and thereby harms outsiders who are excluded from economically and racially homogenous suburbs by high home prices.[63] Viewed this way, exactions cause more problems than they solve.

Of course, such complaints about exactions' effectiveness, fairness, and efficiency can apply to any regulatory device employed by any regulatory agency, and even more so with respect to any particular tool of land use regulation.[64] It is also unclear as a predictive matter precisely how exactions' flaws play out on the regulatory ground. Indeed, it is unclear whether imperfect information, high administrative costs, political and legal limits on local authority, inexpert or corrupt regulatory practices, and unfair and exclusionary decision-making lead, in any particular case, to more or less regulation than the hypothetical ideal of

---

COMMUNITY, AND CIVIL SOCIETY 307, 353–56 (David T. Beito et al. eds., 2002) (calling for privatization of zoning functions within neighborhood associations as a means to dismantle the coercive legacy of planning and land use controls).

61. *See* FISCHEL, *supra* note 36, at 229–31 (noting that developers' preference for underdeveloped and under-regulated land and homeowners' preference for low-density zoning lead to sprawl and "leapfrog" development).

62. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (characterizing an exaction that is unrelated to the harms likely to be caused by a proposed developed constitute "an out-and-out plan of extortion" (internal quotation marks and citation omitted)); *see also* Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 WM. & MARY L. REV. 1513, 1556–57 (2006) (arguing that exactions frequently require newcomers to pay for services and infrastructure that existing residents had received for free); Sterk, *supra* note 49, at 1744–47 (arguing that exactions lead to governmental rent seeking).

63. *See, e.g.*, Mark Edward Braun, *Suburban Sprawl in Southeastern Wisconsin: Planning, Politics, and the Lack of Affordable Housing*, *in* SUBURBAN SPRAWL: CULTURE, THEORY, AND POLITICS 265 (Matthew J. Lindstrom & Hugh Bartling eds., 2003) (arguing that impact fees contribute to residential class segregation). *But see* Been, *supra* note 34, at 146–47 (citing efforts to study whether growth management and impact fees are intended to cause, or in fact cause, exclusion of low-income or minority consumers, but finding mixed evidence).

64. As the editors of an administrative law casebook cogently demonstrate, generalized critiques of any regulatory agency—as well as of any substantive law or regulations they promulgate—frequently proceed at a high level of abstraction, proceed from the critics' sympathy or hostility to the agency's substantive efforts, and tend to whipsaw an agency by condemning it from both sides at once (such as by complaining both that it is subject to capture by regulated parties *and* insufficiently responsive to the needs of regulated parties). *See* JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 30–32 (5th ed. 2003). Local governmental efforts to regulate land use and their use of exactions face the same fate.

the "perfect" exaction.[65] But these flaws certainly make it less likely that something approaching regulatory perfection can ever be achieved.

These criticisms suggest three alternative responses. First, when encompassed within a general, libertarian dismissal of local land use regulation, a critique of exactions as inefficient and extortionate counsels a complete dismantling of local planning, insofar as all of exactions' regulatory imperfections and unfairness are symptomatic of the broader impossibility and failure of planning as a governmental project.[66] Prohibit planning, in other words, and exactions—and the problems they cause—will no longer exist. A second response suggests that local governments can retain the authority to engage in planning and land use regulation but should not have the authority to impose conditions on approvals.[67] Planning is not the problem; it is the discretionary authority to grant conditional approvals and to exact money and land that perverts an otherwise effective regulatory process. A third response asserts that a proper and effective land use planning regime would channel discretionary authority to impose exactions toward particular types of defensible, fair conditions imposed through fair procedures.[68] Exactions are indeed imperfect, but they are superior to an inflexible growth-control system. Some external authority, preferably a higher level of government such as state legislatures or the federal or state judiciary, can effectively police local governments that have the authority to impose exactions.

The first alternative, which would prohibit planning entirely, will not occur in the short term, given the political popularity of land use regulation and the longstanding existence of the legal authority to engage in it. This is especially true after the failure of property rights advocates to curtail that authority through their concerted effort to develop a powerful regulatory takings doctrine.[69] The second alternative, which

65. *See generally* Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1, 166–68 (1998) (arguing that general theories of regulation fail to explain satisfactorily the "facts-on-the-ground" of regulation).

66. *See* RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 181 (1993).

67. The closest the Court has come to indicating a disapproval of exactions as a practice appeared in a footnote in *Nollan* in which Justice Scalia characterized unrelated exactions as a means by which local governments can play with their land use regulations to maximize the rents they seek from property owners. *See* 483 U.S. at 837 n.5. This position could lead to the conclusion that any ability to bargain with property owners using police powers constitutes an excess of authority. Indeed, a similar concern drove the brief flurry of state cases that struck down land use bargains as "contract zoning" because courts feared that the bargaining away of police powers would lead to poor land use planning and corruption. *See supra* note 54 and accompanying text.

68. *See* ALTSHULER & GOMEZ-IBÁÑEZ, *supra* note 30, at 136–39.

69. This failure has been widely noted on the right and left. *See* Eric R. Claeys, *Takings and Private Property on the Rehnquist Court*, 99 NW. U. L. REV. 187, 188–89 (2004) (expressing a conservative natural property rights advocate's profound disappointment with the Rehnquist Court's efforts to expand property rights); Joseph L. Sax, *Property Rights and the Economy of Nature:*

would prohibit or severely curtail exactions, is equally unlikely to occur. At this point in the history of planning, exactions are too widely used and too important to the operation of land use controls to be prohibited. They play a crucial regulatory and ideological role in bringing flexibility to an otherwise inflexible process, ameliorating the negative consequences of controversial new development proposals while persuading political opposition to accept them.[70] The third alternative—to limit and channel discretion and to correct instances in which the discretion is abused or in which exactions produce unacceptably adverse consequences—has been, and will continue to be, the focus of efforts to manage exactions. This was the alternative chosen by the Supreme Court in *Nollan* and *Dolan*.

II. THE CONSTITUTIONALIZATION OF EXACTIONS PRE-2005: *NOLLAN* AND *DOLAN*

A. *NOLLAN* AND *DOLAN*

Nollan and *Dolan* upheld exactions as a general proposition while raising the baseline of protection in states where legislatures and courts had previously deferred to local governmental authority. These decisions concerned property owners' federal constitutional challenges to similar exactions and resulted in two related tests. In each case, a single property owner (in neither case a developer) sought a discretionary approval from a local or regional agency to expand the use of their property.[71] In each case, the agency granted the approval on the condition that the property owner open parts of their land to the public to offset the expected harms that the expanded uses would cause.[72]

The exaction in *Nollan* required petitioners, who sought to replace a dilapidated beach bungalow with a larger house, to dedicate an easement across their beachfront.[73] The easement would join a network of lateral easements across private sections of the beach, enabling the public to walk to a public beach a short distance away.[74] The California Coastal Commission, which has jurisdiction over development in the coastal area and had imposed the condition, sought the easement in order to offset the adverse impacts the house would have on the public's visual access to the beach.[75] The Supreme Court held that the easement was

---

Understanding Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1433, 1437–38 (1993) (noting, from the perspective of a liberal environmentalist, the limits of the Rehnquist Court's efforts to reconstruct property and takings law).

70. *See* NEIL K. KOMESAR, LAW'S LIMITS 110–11 (2001).

71. Dolan v. City of Tigard, 512 U.S. 374, 379 (1994); *Nollan*, 483 U.S. at 828.

72. *Dolan*, 512 U.S. at 381–82; *Nollan*, 483 U.S. at 828.

73. 483 U.S. at 828.

74. *Id.*

75. *Id.*

constitutionally excessive as an exaction because the easement was insufficiently connected to the harm that the Commission sought to address in imposing it.[76] The Court stated that the Constitution requires an "essential nexus" between a condition imposed by the government and the government objective that the condition is intended to advance.[77] Visual access, the Commission's stated objective, had virtually no nexus to the easement and therefore represented a drastic incursion on the owners' right to exclude the public from their property.[78]

The Court reached its conclusion in this manner: Had the Commission simply taken the easement from the Nollans, the Takings Clause would have required that the Nollans be compensated.[79] But so long as the Commission imposed an exaction that was clearly related to its police power authority and to the permissible objectives it hoped to achieve under that authority, no compensation would be required.[80] In other words, local police power can impose exactions that pursue a legitimate objective. Under those circumstances, the Takings Clause does not require compensation for a regulatory act with an essential nexus to that objective that otherwise results in a taking of property. The Takings Clause does not, however, allow local governments to extort private property—by requiring exactions that either lack, or are unrelated to, a legitimate purpose—unless the property owner is compensated.[81] The Commission's exaction in *Nollan* required compensation not simply because it took an essential property right from the Nollans (the right to exclude the public), but because it used the Commission's police power authority to take the property without demonstrating that the taking had an essential nexus to the Commission's actual objectives in exercising that authority.[82]

While *Nollan* concerned the qualitative nexus between an exaction and the government's regulatory purpose, *Dolan* considered the quantitative proportionality between an exaction and the harms that the city of Tigard, Oregon sought to mitigate by imposing the exaction.[83] In *Dolan*, the property owner sought permits in order to expand her hardware store and the store's parking lot.[84] The city conditioned issuance of its permits on the property owner's dedication to the public of both an undeveloped part of her land for a floodplain and an

76. *Id.* at 838–39.
77. *Id.* at 837.
78. *Id.* at 838.
79. *Id.* at 841–42.
80. *Id.* at 841.
81. *Id.* at 837.
82. *See id.* at 838.
83. *See* Dolan v. City of Tigard, 512 U.S. 374, 377 (1994).
84. *Id.* at 379.

easement across her land for a bicycle path.[85] As in *Nollan*, the city of Tigard would have been required to pay compensation if it had simply taken the land and easement for the bike path and floodplain. But these exactions met *Nollan*'s qualitative nexus test because flooding and traffic constitute legitimate police power concerns.[86] In theory, the bike path would have served as part of a network of bike routes the city was piecing together and would have offset the anticipated increase in traffic from the store expansion.[87] The floodplain would offset the increase in impermeable surfaces on the owner's land from the expanded structures and pavement, which would create additional flooding on her property.[88]

Nevertheless, the Court held that these exactions required compensation because they required too much from the property owner.[89] In the Court's words, they lacked "rough proportionality" both "in nature and extent to the impact of the proposed development."[90] The Court found that the city had failed to meet its burden of demonstrating that these dedications were quantitatively necessary to mitigate the harms expected to result from the property's expanded use.[91] The floodplain did not need to be dedicated to the public in order to retain storm water, and the Court was unconvinced that dedication of the bike path was required to mitigate the anticipated increase in automobile traffic to and from the hardware store.[92] *Dolan*'s rough proportionality test thus took its place alongside *Nollan*'s essential nexus test in the pantheon of regulatory takings tests.

B. Uncertainty and Variability After *Nollan* and *Dolan*

If the Court—or at least the justices who constituted the slim majorities in *Nollan* and *Dolan*[93]—considered its constitutional tests for exactions to be clear, authoritative, and likely to contain administrative discretion in imposing exactions, it was sorely mistaken. Prior to the Court's oblique return to the exactions issue in its 2004 Term, four members of the *Dolan* majority had poured their frustrations over *Nollan* and *Dolan*'s failure to constrain land use regulation into dissents

85. *Id.* at 379–80.
86. *Id.* at 387.
87. *Id.* at 387–88.
88. *Id.* at 382.
89. *Id.* at 391.
90. *Id.*
91. *Id.* at 394–95.
92. *Id.* at 393–94.
93. Chief Justice Rehnquist's decision in *Dolan* was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id.* at 376. Justice Scalia's *Nollan* decision was joined by Chief Justice Rehnquist and Justices White, Powell, and O'Connor. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 826 (1987). All five members of the *Dolan* majority were still on the Court for the 2005 takings decisions. *See* Supreme Court of the United States, Members of the Supreme Court of the United States, http://www.supremecourtus.gov/about/members.pdf (last visited Mar. 1, 2007).

from denials of certiorari in two cases. In one, Justice Scalia, joined by two of his colleagues, accused local governments and lower courts of willfully ignoring Supreme Court precedent.[94] Whether the fault lay in the local political branches for refusing to respect federal constitutional limits on their discretion, or in federal and state judicial actors for failing to enforce those limits, or in the exactions decisions themselves, the decade between *Dolan* and the 2004 Term saw significant uncertainty among courts and litigants over how to identify the types of exactions to which heightened scrutiny applies.[95]

One significant source of confusion, caused by the Court itself, has been the reach of the nexus and proportionality tests, an unresolved issue that created two questions the Court had failed to address directly before its 2004 Term. First, do the nexus and proportionality requirements apply only to exactions that require the dedication of land for public use (as in the facts of *Nollan* and *Dolan* themselves), or do they extend to exactions such as impact fees or conservation easements that do not require the property owner to forfeit the right to exclude?[96] *Nollan* and *Dolan* included language indicating that the land/non-land distinction made a constitutional difference,[97] but many lower courts had not considered the decisions to be limited to their narrow facts.[98] Second, do *Nollan* and *Dolan* apply only to adjudicative decisions imposing exactions on an individual piece of land, or do they also extend to legislative decisions imposing equivalent exactions on all development within an entire jurisdiction or larger units thereof? On this question, the Court had indicated prior to its 2004 Term that only individualized exactions fall within the special context of exactions.[99] But again, lower

94. *See* Lambert v. City and County of San Francisco, 529 U.S. 1045, 1049 (2000) (Scalia, J., dissenting) (joined by Justices Thomas and Kennedy); *cf.* Parking Ass'n v. City of Atlanta, 515 U.S. 1116, 1116 (1995) (Thomas, J., dissenting) (joined by Justice O'Connor, arguing that *Nollan* and *Dolan* should apply to legislatively imposed exactions as well as individualized exactions).

95. *See* Richard A. Epstein, *The Harms and Benefits of* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 477, 492 (1995) (criticizing lower courts' dislike of *Nollan*); Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 555–56 (1995) (documenting lower courts' record of failing to enforce Supreme Court takings decisions, including *Nollan* and *Dolan*).

96. *See* Nancy E. Stroud, *A Review of* Del Monte Dunes v. City of Monterey *and Its Implications for Local Government Exactions*, 15 J. LAND USE & ENVTL. L. 195, 203–05 (1999).

97. *See Dolan*, 512 U.S. at 385 (distinguishing *Dolan*, in which the challenged exaction required the property owner to dedicate part of her land to the city, from other regulatory takings cases applying different standards of review, in which the challenged regulations imposed conditions that were "simply a limitation on the use" the property owners made of their land); *Nollan*, 483 U.S. at 841 (noting that required dedications demand more careful judicial review because of the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective").

98. *See* Stroud, *supra* note 96, at 202–06 (discussing the split among courts on this point and possible implications of *Del Monte Dunes*).

99. *See Dolan*, 512 U.S. at 385 (distinguishing between challenges to "essentially legislative

courts have not considered themselves bound by the Court's language,[100] and a sizeable minority of courts, with the support of some Supreme Court justices and commentators, has applied the nexus and proportionality tests to legislative exactions.[101] The Court had produced tea leaves sufficient to provoke speculation as to how it would settle the land/ non-land issue as recently as *City of Monterey v. Del Monte Dunes*,[102] but it had not settled either issue authoritatively by the time it decided *Lingle*—at least in part because the tea leaves it had produced five years earlier hinted in the opposite direction.[103]

C. THE IMPERFECTIONS OF *NOLLAN* AND *DOLAN*

While a number of commentators have praised *Nollan* and *Dolan*, disappointed only that the Court has not extended their tests more broadly,[104] critics have complained of the decisions' conceptual, normative, descriptive, and consequential flaws.[105] Indeed, the decisions

---

determinations classifying entire areas of the city," and the challenges reviewed in *Dolan* (and, by implication, *Nollan*), which were challenges to "adjudicative decision[s] to condition petitioner's application for a building permit on an individual parcel"); *see also id.* at 391 n.8 (noting that judicial review of "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel" applies heightened scrutiny and places the burden on the government entity to prove that an exaction does not effect a taking, as opposed to judicial review of "generally applicable zoning regulations," which proceeds under a more relaxed scrutiny with the burden on the property owner to demonstrate that the exaction constitutes a taking).

100. *See* Fenster, *supra* note 10, at 639 n.144 (citing cases).

101. *See, e.g.*, Parking Ass'n of Georgia v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., dissenting) (attacking the legislative/adjudicative distinction as unclear, illogical, and essentially meaningless); Laurie Reynolds, *Local Subdivision Regulation: Formulaic Constraints in an Age of Discretion*, 24 GA. L. REV. 525, 544–49 (1990) (arguing that the legislative/adjudicative distinction is meaningless in the local context where governments are smaller and their structures less formal); Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 260–61 (2000).

102. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) (stating that the exactions rules apply only to those conditions for approval that require "the dedication of property to public use").

103. On the next business day after it issued its decision in *Dolan*, the Court directed the California Supreme Court to review, in light of *Dolan*, a California Court of Appeal decision that had applied a relatively low standard of review to impact fee exactions. Ehrlich v. City of Culver City, 512 U.S. 1231, 1231–32 (1994). The California Supreme Court, in turn, applied *Nollan* and *Dolan* to the exaction. Ehrlich v. City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (plurality opinion).

104. *See* Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 963–64 (2003) (arguing in favor of extending *Nollan* and *Dolan*'s heightened means-ends test for "public use" inquiries in eminent domain litigation); Douglas W. Kmiec, *Inserting the Last Remaining Pieces into the Takings Puzzle*, 38 WM. & MARY L. REV. 995, 1044–45 (1997) (arguing in favor of the nexus and proportionality tests' general applicability for all land-use takings cases); Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 DENV. U. L. REV. 893, 904–08 (1995) (arguing that the exactions decisions signaled that the Court was imposing a generalized "causation" test under the Takings Clause that would require compensation for any regulation that performs more than narrowly forced cost-internalization on a land use's negative externalities).

105. *See supra* note 29 (listing commentaries critical of *Nollan* and *Dolan*).

are by no means perfect. They simplify the local political, regulatory, and market contexts for imposing exactions, and fail to recognize the institutions that check local governmental discretion.[106] When read broadly, the decisions assume that property owners are universally vulnerable to extortion by local governments and require broad protection against unconstitutional confiscations. Part IV of this Article describes the context that the Court's caricature ignores as an institutional web within which land use regulation operates; suffice it to say here that the Court's assumptions are overly simplistic.

The Court's failure to consider context and complexity in the local land use regulatory process led it to fashion prophylactic, formalistic rules in its nexus and proportionality tests[107] that operate in isolation from more relevant inquiries that would better focus on the extent to which an exaction unfairly took property from an individual. In the continuum of regulatory takings tests, the proportionality and nexus tests are closer to the mechanical rule for a permanent physical invasion (which always requires compensation) than to the indeterminate and multi-factor *Penn Central* balancing test.[108] By definition, mechanical rules narrow the scope and sharpen the edge of judicial inquiry into complex regulatory transactions. These rules then narrow the exercise of administrative discretion when a regulatory agency, fearing the possibility of litigation and the application of those mechanical rules to its regulatory decisions, follows the rule rather than its own conclusions regarding the wisest regulatory course.[109]

Because the Court misunderstood or ignored the regulatory field on which its exactions rules apply and failed to make clear when these rules apply, *Nollan* and *Dolan* have produced a number of unanticipated consequences—many of which adversely affect the rights of property owners as well as the discretion of government planning.[110] In some jurisdictions, the Court's protections and other pressures have helped contribute to instances in which local governments have placed minimal or no conditions on approvals for fear of exposing themselves to costly

106. *See* Dana, *supra* note 29, at 1271–74; Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1131–39 (1996) (reviewing FISCHEL, *supra* note 29).

107. *See* ROSSI, *supra* note 10, at 107–08 (praising formalism in *Nollan* and *Dolan*).

108. *See* Fenster, *supra* note 10, at 629.

109. *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 145–49 (1991) (describing how rules narrow the focus of decision-makers to limited set of concerns); Thomas W. Merrill, *The* Mead *Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807, 822–23 (2002) (describing how the choice of rules or standards for the standard of judicial review of agency action affects agency behavior); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (arguing that clear rules offer the advantages of uniform interpretation and predictable implementation).

110. The paragraphs that follow summarize arguments and data presented in Fenster, *supra* note 10, at 652–68.

litigation, thereby enabling new development to push its costs onto existing residents. But in jurisdictions that strongly support growth controls and enjoy a booming real estate market, local regulators have successfully avoided the Court's constitutional commands and imposed exactions that were unrelated or arguably disproportionate to a development project's harms.[111]

Furthermore, by limiting the type as well as the extent of exactions, *Nollan* and *Dolan* limit the universe of potential bargains and conditions that might effectively persuade local opposition to a proposed project—thereby limiting the freedom of property owners to trade property rights for regulatory entitlements and making it more likely that a local government will deny a project rather than bargain to a mutually acceptable exaction.[112] That is, *Dolan* by itself might provide sufficient protection for a property owner through its proportionality requirement. But *Nollan* can narrow the range of local government discretion, sometimes to the detriment of the property owner. For example, if a jurisdiction would prefer some condition, the cost of which would be proportional to the anticipated harm but which lacks an "essential nexus" to the harm, it may turn down a project for fear of takings liability under *Nollan*.

---

111. This can occur in two ways. First, in overheated real estate markets local governments can simply not comply with *Nollan* and *Dolan* by dealing only with repeat-playing developers who are willing to suffer excessive exactions because of the profit margins of their proposed developments. *See* Dana, *supra* note 29, at 1286–94; Fenster, *supra* note 10, at 666–68.

Second, local governments can utilize regulatory tools to which *Nollan* and *Dolan* may not apply. For example, local governments can obtain exactions that might otherwise fail under *Nollan* and *Dolan* through development agreements authorized in some states by statute whereby the municipality agrees to freeze the regulatory requirements that will be applied to a development in exchange for the developer's agreement to meet enumerated conditions (which may include the dedication of land). *See* DANIEL R. MANDELKER, LAND USE LAW § 6.23 (5th ed. 2003). Although such agreements would thereby impose a per se taking through an individualized exaction, proponents of development agreements argue that because they are voluntary, bilateral contracts, they should not be subject to nexus and proportionality tests under the Takings Clause. *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663, 692–93 (2001); Daniel J. Curtin, Jr., & Sanford M. Skaggs, *Legal Issues and Considerations*, *in* DEVELOPMENT AGREEMENTS: PRACTICE, POLICY, AND PROSPECTS 121, 130–31 (Douglas R. Porter & Lindell L. Marsh eds., 1989); Patricia Grace Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 158–59 (1995). *But see* Michael H. Crew, *Development Agreements After* Nollan v. Cal. Coastal Comm'n, 22 URB. LAW. 23, 50–55 (1990) (arguing that development agreements should be subject to *Nollan*); Wegner, *supra* note 54, at 1000 (arguing that development agreements are regulatory, rather than contractual). Similar issues arise when exactions are required as part of annexation agreements. *See* Peggy L. Cuciti, *Exactions through Annexation Agreements: A Case Study*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES, *supra* note 53, at 238–44.

112. FISCHEL, *supra* note 29, at 348–49; Been, *supra* note 29, at 497; Fennell, *supra* note 14, at 50; Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 48 (1991).

At the same time, in an effort both to regularize their exactions practice and to take advantage of the presumption that *Nollan* and *Dolan* do not apply either to legislated or non-possessory exactions, many local governments have adopted legislative, formulaic impact fees and relied more heavily on conditions requiring the payment of those fees than on the dedication of real property.[113] Using this practice, local governments have pursued a more mechanical, less discretionary approach to land use regulation and have foregone more open-ended negotiations over a wider universe of possible exactions. This practice also potentially limits the ability of property owners to negotiate an individualized exaction that would be more advantageous and attractive to both parties.

These criticisms concern the decisions' conceptual and consequential failings. But the formalistic tests in *Nollan* and *Dolan* also appear to disregard important considerations that are typically part of regulatory takings inquiries. They ignore, or at least minimize the significance of, the fundamental *Armstrong* principle of regulatory takings,[114] which asks whether burdens are spread fairly throughout the community.[115] It is possible, for example, for a permissible exaction under *Nollan* and *Dolan* to impose a burden on a property owner that was not imposed on others; it is also possible for an unconstitutional exaction to be widely imposed on others in the community.[116] Thus, nexus and proportionality do not help identify instances in which a property owner has been unfairly singled out for a burdensome exaction.[117] Nor do they help courts identify when a property owner who is subject to an exaction also gains a reciprocal advantage from the imposition of exactions on other, similarly situated, members of the community.[118] In *Nollan* and *Dolan*, for

113. *See generally* James C. Nicholas, *Designing Proportionate-Share Impact Fees*, *in* PRIVATE SUPPLY OF PUBLIC SERVICES 127, 130–34 (advocating use of formulaic fees that would survive judicial review); Reynolds & Ball, *supra* note 52, at 465–69.

114. *See* Armstrong v. United States, 364 U.S. 40, 49 (1960) (declaring that the Takings Clause was "designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole").

115. *See* Ball & Reynolds, *supra* note 62, at 1547–53.

116. Indeed, the facts of *Nollan* indicate that this occurred with the lateral beach easement in that case. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 829 (1987) (noting that forty-three out of sixty coastal development permits along the same tract of land had included identical beach easements to those challenged in *Nollan*, and that of the remaining seventeen properties, fourteen permits had been issued before the Commission had issued regulations enabling it to impose a condition, and the remaining three did not have oceanfront property).

117. *See* D.S. Pensley, Note, *Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions*, 91 CORNELL L. REV. 699, 722–31 (2006) (incorporating from corporate law an "intrinsic fairness" test that would closely consider process and burden issues in individual cases).

118. Justice Holmes originally suggested the "reciprocity of advantage" inquiry in *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). It has more recently been relied upon in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 341 (noting reciprocal advantages to

example, the property owners would have benefited from the positive network effects of lateral beach easements and bike path easements that the government agencies were attempting to piece together.[119]

In short, the Court's exactions decisions failed to provide an effective constitutional approach to exactions. Instead, they established overly simple rules that are inconsistent with at least some aspects of the Court's regulatory takings doctrine—rules whose application is unclear and whose consequences are significantly less than perfect. These imperfections and uncertainties were the legal context within which exactions returned to the Court, albeit obliquely, in *Lingle v. Chevron.*

III. EXACTIONS, VERSION 2005: *LINGLE*, *SAN REMO HOTEL*, AND THE 2004 TERM

The Court granted petitions for certiorari in three takings cases for its 2004 Term, two of which concerned regulatory takings claims.[120] But the Court avoided explicit reconsideration of its exactions jurisprudence in the case that involved an exaction,[121] even as it restated its exactions rules in the other decision which did not concern an exaction.[122]

A. *SAN REMO HOTEL*: TAKINGS PROCEDURE OVER EXACTIONS SUBSTANCE

One of the three takings cases for which certiorari was granted in the 2004 Term actually concerned a challenge to an exaction. The petition for certiorari filed by the plaintiffs in *San Remo Hotel v. City and County of San Francisco* presented two questions.[123] The second raised a substantive issue concerning the applicability of *Nollan* and *Dolan* to exactions that are imposed through legislation rather than through more specific, individualized administrative processes.[124] The substantive issue arose from the hotel owners' challenge to a $567,000 fee that San Francisco charged under its Hotel Conversion Ordinance for converting

---

all property owners from temporary moratorium), and in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 (1987) (citing reciprocal advantages as a rationale for upholding state statute against a regulatory takings challenge because some of the statute's benefits are likely to redound to property owner).

119. *See Nollan*, 483 U.S. at 856 (Brennan, J., dissenting); Ball & Reynolds, *supra* note 62, at 1554–59 (identifying the "reciprocity of advantage" enjoyed by property owners in the exactions challenged in *Nollan* and *Dolan*).

120. The third takings decision famously considered the Public Use Clause of the Fifth Amendment's Takings Clause. *See Kelo v. City of New London*, 545 U.S. 469, 455 (2005) (holding that the "public use" requirement for exercise of eminent domain under the Fifth Amendment did not bar city's exercise of eminent domain power in furtherance of an economic development plan that would result in acquired property's use for private development).

121. *See infra* Part III.A.

122. *See infra* Part III.B.

123. *See* Petition for Writ of Certiorari at i, San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005) (No. 04-340).

124. *See id.*

rooms in their hotel from residential to tourist use.[125] The fee constituted a required, in-lieu contribution to the city's effort to provide affordable housing, and was intended to mitigate the impact that the loss of residential hotel units, which serve as housing predominantly for the poor, elderly, and disabled, would have on the city's diminishing supply of affordable housing.[126] The California Supreme Court, following *Nollan* and *Dolan* and its own precedent, held that the Supreme Court's heightened nexus and proportionality requirements did not apply to the challenged fee because the housing replacement fee was based upon a statutorily created formula that was applied mechanically to the plaintiff's proposed conversion.[127] Instead, the California Supreme Court held, a more relaxed, "reasonable relationship" test applied, under which the fee survived both facial and as-applied challenges.[128]

The substantive appeal thus raised one of the key issues left open in the Court's exactions decisions and strenuously debated by lower courts and commentators in the intervening years: whether an exaction imposed by legislation rather than by individualized adjudication should be scrutinized under *Nollan* and *Dolan* or under some lower standard developed by state courts.[129] But the Court granted certiorari only to consider the other question raised in the *San Remo Hotel* petition, which concerned issue preclusion in federal court when a state court had previously adjudicated a takings claim under state constitutional law.[130] The Court's decision in *San Remo Hotel*—holding that under the full faith and credit statute,[131] a plaintiff whose federal regulatory takings claim is resolved by a state court under state takings law is precluded from re-litigating the claim in federal court[132]—only resolved the procedural and jurisdictional question and did not consider any substantive issues relating to exactions.

B. *LINGLE* AND EXACTIONS

In the meantime, the Court had granted certiorari to another

125. *See* San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87, 95 (Cal. 2002).

126. *See id.* at 91–92.

127. *See id.* at 104–05 (relying on Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996), as well as on *Nollan* and *Dolan*).

128. *See id.* at 105–11.

129. Theoretically, the case could have raised the other open issue—whether heightened scrutiny applies to monetary exactions. *See supra* text accompanying notes 96–98. However, the California Supreme Court had settled that issue in its *Ehrlich* decision, and the issue was not raised in the U.S. Supreme Court. *See Ehrlich*, 911 P.2d at 433 (plurality opinion) (holding that *Nollan* and *Dolan* apply to an individualized monetary exaction).

130. *See* San Remo Hotel, L.P. v. City and County of San Francisco, 543 U.S. 1032, 1032 (2004) (granting petition for certiorari as to only one question).

131. 28 U.S.C. § 1738 (2000).

132. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).

regulatory takings case out of the Ninth Circuit, *Lingle v. Chevron.*[133] *Lingle* concerned the viability under the Takings Clause of a test originally articulated in the Court's 1980 decision in *Agins v. City of Tiburon*, which considered whether a regulation challenged under the Fifth Amendment's Takings Clause "substantially advance[s] [a] legitimate state interest."[134] Under *Agins*, this test could stand alone as a basis for takings liability.[135] The unanimous decision in *Lingle*, however, held that the "substantially advances" test is appropriate only as the basis of a substantive due process claim and is unsuitable for adjudication of a takings claim.[136] In the process, the Court offered a comprehensive review of the Court's takings jurisprudence closing with a fairly extensive discussion of its exactions decisions, in order to explain that *Nollan* and *Dolan* neither overlapped with nor depended upon the rejected test from *Agins*.[137]

1. *The Issue and Result in* Lingle

In *Lingle*, the Supreme Court considered an appeal by Hawaii to an adverse takings judgment requiring gas companies to be compensated for the losses they suffered from a legislative cap on the amount of rent that they could charge dealers to whom they leased their gas stations.[138] The legislation was enacted in order to address concerns about the price effects of market concentration in retail gasoline sales in the state.[139] The federal district court had applied the "substantially advances" test from *Agins* without considering the extent of the harm to the gas companies' property rights, and it had inquired extensively into the purpose, wisdom, and likelihood of success of a legislative enactment.[140] The Ninth Circuit affirmed both the lower court's use of *Agins* and its judgment.[141]

The Supreme Court reversed, holding that the "substantially advances" test did not belong within the limited range of inquiries authorized by the Takings Clause.[142] These inquiries include, most

133. Chevron U.S.A., Inc. v. Cayetano, 363 F.3d 846 (9th Cir.), *cert. granted*, 543 U.S. 924 (2004).

134. Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 531–33 (2005).

135. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

136. *See Lingle*, 544 U.S. at 543–46.

137. *See id.* at 545–48. The exactions discussion comprised most of Part III of the *Lingle* decision. *See id.*

138. For more thorough descriptions of *Lingle* and its place within the Court's regulatory takings doctrine, see generally D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of* Lingle v. Chevron *and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005); Robert G. Dreher, Lingle*'s Legacy: Untangling Substantive Due Process from Takings Doctrine*, 30 HARV. ENVTL. L. REV. 371 (2006); Fenster, *supra* note 25; Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 327–29 (2006).

139. *Lingle*, 544 U.S. at 533.

140. *See* Chevron U.S.A., Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1192 (D. Haw. 2002).

141. *See* Chevron U.S.A., Inc. v. Cayetano, 363 F.3d 846, 852 (9th Cir. 2004).

142. *Lingle*, 544 U.S. at 532.

prominently, tests that identify whether a regulation results in a "functional equivalent" to the exercise of the eminent domain power—either by imposing a permanent physical invasion of private property or by diminishing entirely the property's economic value,[143] or by creating a lesser burden that nevertheless requires compensation under a multi-factor balancing test that considers, among other things, the extent of the diminution in the property's value and the frustration of the owner's reasonable investment-backed expectations.[144] The *Agins* test, by contrast, had allowed a property owner to allege that a regulatory act effected a taking solely on the basis of the character of the government's action, without reference to whether the act had any effect on the use or value of his property.[145] Furthermore, the "substantially advances" test, especially as applied without reference to the regulation's effect on the owner's property, invited courts to scrutinize the purpose, wisdom, and functionality of a regulatory act in an open-ended and potentially rigorous way.[146] None of the other tests within the pantheon of regulatory takings jurisprudence makes such an inquiry—and, the Court declared, none should. *Lingle* banished the *Agins* test to the junkyard of abandoned constitutional doctrine.[147]

Lingle performed two additional tasks. First, it clarified the nature of the regulatory takings inquiry. The Takings Clause, the Court unanimously declared, protects property owners from the ends rather than the means of a regulation.[148] Put another way, the regulatory takings doctrine focuses only on effects and does not concern regulatory purpose and method.[149] Second, in *Lingle* and other takings decisions from its 2004 Term, the Court clarified its general approach to the Takings Clause.[150] The Takings Clause does not authorize the judiciary to second-guess or engage in searching review of decisions made by competent institutions whose authority to make those decisions has been long settled. Instead, it empowers the judiciary to require compensation in

143. *Id.* at 538–41 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that permanent physical invasion of property effects a taking), and Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992) (holding that a regulation that denies an owner "all economically beneficial use" of her land effects a taking)).

144. *See id.* (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123–25 (1978) (establishing default standard for takings claims that involves "essentially ad hoc, factual inquiries" into the challenged regulatory act and its effects).

145. *See id.* at 540–42.

146. *See id.* at 544–46

147. *Cf.* Bradley C. Karkkainen, *The Police Power Revisited: Phantom Incorporation and the Roots of the Takings "Muddle,"* 90 MINN. L. REV. 826, 883–84 (2006) (arguing that *Lingle* provides only a muddled, post hoc correction to the Court's greater historical error, made more than a century earlier: holding that the Takings Clause had been incorporated within the Fourteenth Amendment).

148. *Lingle*, 544 U.S. at 543.

149. *See* Barros, *supra* note 138, at 348.

150. *See* Singer, *supra* note 138, at 329.

instances in which another institution has clearly or functionally confiscated property. The Court has provided hard-edged, powerful rules that apply a form of strict judicial scrutiny to address such instances. But when those rules are not triggered, the judiciary as an institution must defer to expert agencies that are overseen by elected branches of government, to whom regulatory decisions are delegated by the federal Constitution and state law.

2. *Exactions in* Lingle

Lingle concerned an economic regulation, rather than an exaction. But in providing an authoritative restatement of its regulatory takings doctrine, the Court was forced to explain how *Nollan* and *Dolan*, as regulatory takings decisions, fit within its newly articulated, general approach to the Takings Clause. It did so in two ways, in a separate and final Part III of the decision: by identifying the kinds of exactions which the nexus and proportionality tests reach, and by offering a theoretical and doctrinal justification for those tests in the takings context.[151] The conditions that were challenged in *Nollan* and *Dolan*, the Court explained, were "adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit."[152] These factual predicates concern the substance (or "what") and procedural posture (or "how") of the exactions to which the Court applied its nexus and proportionality tests. The conditions in both cases required the property owner to dedicate land, or some entitlement relating to land (such as the right to exclude), rather than some other property, such as money. As such, the exactions in *Nollan* and *Dolan* constituted "per se" takings that would clearly have required compensation but for the fact that they were part of a condition on development.[153] The exactions also had been imposed individually, through an "adjudicative" process, rather than through the application of legislatively implemented, comprehensive sets of conditions required of all or many similarly situated property owners.[154]

151. *See Lingle*, 544 U.S. at 545–48.

152. *Id.* at 546–47 (citing Dolan v. City of Tigard, 512 U.S. 374, 379–80 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 828 (1987)) (reiterating that in *Dolan*, the Court held that "an *adjudicative* exaction requiring *dedication of private property*" faced the application of a rough proportionality requirement (emphasis added)). In a parenthetical explaining how *Del Monte Dunes* supported this limited reading of *Nollan* and *Dolan*'s applicability, the Court noted that *Del Monte Dunes* "emphasiz[ed] that we have not extended this standard 'beyond the special context of *[such]* exactions.'" *Id.* (quoting City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999)) (emphasis added).

153. *Id.* at 547–48.

154. *See id.* at 546–47 (characterizing both decisions as concerning "adjudicative land-use exactions," and specifically describing *Dolan*'s "rough proportionality" rule as applying to an "adjudicative exaction").

Lingle explained that the exactions rules protect property owners from being forced to suffer a deprivation of property as a development condition that would otherwise require compensation under the Takings Clause.[155] As such, the decisions were based as much upon the "unconstitutional conditions" doctrine as on the Takings Clause.[156] But *Nollan* and *Dolan* did not strictly apply that doctrine;[157] rather, they applied it as follows: A transaction that appears to violate the Takings Clause may nevertheless be constitutionally permissible if the regulation is within the government's police power authority and goes no further than is necessary to accomplish a legitimate police power objective. An exaction can only escape takings liability, however, if it relates both qualitatively (i.e., with an "essential nexus") and quantitatively (i.e., in "rough proportionality") to an important regulatory purpose—mitigating the development's expected negative consequences.[158]

Lingle made plain that the nexus and proportionality tests anchor judicial review to a limited set of questions, rather than enabling the open-ended inquiry that the *Agins* test allowed.[159] These questions are both substantive and procedural. The Takings Clause aspect of the exactions decisions protects an individual from a regulatory confiscation of real property that would otherwise constitute a per se taking. *Nollan* and *Dolan* are thus consistent with *Lingle* because they consider the extent of the burden an individual property owner is being forced to bear. The unconstitutional conditions doctrine aspect of the exactions decisions recognizes that a development condition is unconstitutional if the government unfairly takes advantage of its significant regulatory leverage by singling out a property owner in the administrative process and imposing a per se taking. The act of singling out a property owner for an individualized regulation makes the condition more suspect. Therefore, the application of heightened scrutiny only to such individualized acts, and only when the exaction unquestionably would be a taking if imposed directly, is consistent with *Lingle*'s general

155. *See id.*

156. *Id.* at 547–48 (quoting *Dolan*, 512 U.S. at 385).

157. *See* DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 215–17 (2002) (concluding that constitutional property rights appear to receive limited, though not insignificant, protection in the unconstitutional conditions doctrine).

158. *See Lingle*, 544 U.S. at 547–48.

159. The Court did concede in *Lingle*, however, that one *could* have read both *Nollan* and *Dolan* to be based in part on *Agins*, since the Court in both of its earlier decisions had cited the "substantially advances" test as bases for the nexus and proportionality tests. *See id.* at 547; *see also Dolan*, 512 U.S. at 385 (citing *Agins* and its "substantially advances a legitimate state interest" test); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (same). *Cf.* Dwight H. Merriam & R. Jeffrey Lyman, *Dealing with* Dolan, *Practically and Jurisprudentially*, *in* 1995 ZONING AND PLANNING HANDBOOK 111, 126–27 (arguing that the unconstitutional conditions doctrine did not apply in *Nollan* because, unlike in *Dolan*, the Coastal Commission was not granting a discretionary benefit by allowing the Nollans to build their proposed house).

disapproval of takings doctrines that allow rigorous judicial scrutiny of a regulation's substantive wisdom. Exacting a per se taking through an individualized process poses a greater risk of an unfair bargaining process that will result in an undue burden falling on a property owner. When that risk is highest, the nexus and proportionality tests apply.

The Court's reasoning in *Lingle* appears decidedly post hoc. *Nollan* did not declare itself to be based upon the unconstitutional conditions doctrine and cited no unconstitutional conditions precedent.[160] *Dolan*'s discussion of the doctrine was thin[161] and included the absurd statement that the doctrine is "well-settled," when constitutional scholars agree only that it is as much of a mess as the regulatory takings doctrine.[162] The signals *Lingle* sends regarding possessory exactions seem at least consistent with an earlier signal, sent soon after *Dolan*, when the Court vacated a California appellate court's decision regarding the application of heightened scrutiny to fees.[163] The *Lingle* decision will fail to persuade commentators and courts seeking either fully coherent, formal distinctions or expansive property rights.[164] But retroactive explanation and conceptual closure are at the core of *Lingle*'s project to explain regulatory takings anyway, no matter the unsatisfactory nature, to some, of the reasoning it employs to reach an explanatory closure. The decision's power and authority arise from its ability to provide a coherent restatement of what was long considered an incoherent, unsatisfactory doctrine that expanded and contracted at the whims of a shifting Court majority. Like the resolution of a complicated mystery, *Lingle* leaves

160. Commentators have noted, however, that the doctrine was implicit in *Nollan*. *See* Been, *supra* note 29, at 474; Thomas W. Merrill, Dolan v. City of Tigard: *Constitutional Rights as Public Goods*, 72 DENV. U. L. REV. 859, 868–69 (1995) (characterizing as "mediocre" and "troubling" the majority decision's effort to explain how and why it was extending the unconstitutional conditions doctrine to the Takings Clause); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1463 (1989).

161. *See* Fenster, *supra* note 10, at 633 n.116.

162. *Compare Dolan*, 512 U.S. at 385, *with* Sullivan, *supra* note 160, at 1416 (describing judicial application of unconstitutional conditions doctrine as "riven with inconsistencies"), *and* Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1304 (1984) (complaining of inconsistent judicial application of the doctrine sufficient "to make a legal realist of almost any reader"). Attempts to impose theoretical coherence on the doctrine have failed to settle the field in the least. *See generally* Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 4–6 (2001) (summarizing earlier attempts to explain the unconstitutional doctrine, noting their failures, and offering still another such attempt).

163. Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) (vacating and remanding, by a 5–4 vote, *Ehrlich v. City of Culver City*, 19 Cal. Rptr. 2d 468 (Ct. App. 1993), in which the state court refused to apply exactions decisions to impact fee exactions).

164. *See, e.g.*, Steven A. Haskins, *Closing the* Dolan *Divide—Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487, 519–21 (2006) (entirely ignoring *Lingle*'s discussion of *Nollan* and *Dolan*, except insofar as it reiterated the significance of the unconstitutional conditions doctrine, and reiterating longstanding complaints about the legislative/adjudicative and real/personal property distinctions).

some loose ends untied. But if the Court's explanation of its exactions cases arrived a bit late in the game and is not wholly persuasive, at least the Court unanimously and confidently offered an explanation that *appears* comprehensible, cohesive, and relatively inconsistent with its other regulatory takings decisions.

3. Lingle*, Exactions, and Precedent*

But should and will *Lingle*'s discussion of the exactions decisions, and specifically its description of *Nollan* and *Dolan* as limited to the factual circumstances of adjudicated conditions requiring the owners to dedicate land, have sufficient precedential value to resolve for lower courts the unsettled issues in the exactions decisions? The Court's entire discussion of *Nollan* and *Dolan* in *Lingle* was, in a sense, beside the point of a case that concerned neither an exaction nor any of the legal rules established in the exactions decisions. Theoretically, *Lingle* could have been decided without any reference to exactions, and Justice O'Connor could have left Part III, the section on exactions, entirely out of her decision and still resolved the question before the Court. And in the Fall 2006 Term, the Court again denied a petition for certiorari that directly raised these issues.[165] Accordingly, a state or lower federal court considering a federal constitutional challenge to an exaction may attempt to ignore as dicta the Court's statements limiting *Nollan* and *Dolan*—that is, as unnecessary to the decision and therefore as having no precedential value.[166] Indeed, courts and commentators have used this reasoning before in order to ignore similar signals the Court sent six years earlier in *Del Monte Dunes*.[167]

---

165. *See* City of Olympia v. Drebick, 127 S. Ct. 436 (2006).

166. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399–400 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision."); BLACK'S LAW DICTIONARY 749 (8th ed. 2004) (defining "holding" as "[a] court's determination of a matter of law pivotal to its decision; a principle drawn from such a decision"); *id.* at 1102 (defining "obiter dictum" as "[a] judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential"); EUGENE WAMBAUGH, THE STUDY OF CASES 15 (2d ed. 1894) (the rule of decision is "a proposition which strips away the unessential circumstances and declares a rule as to the essential ones").

167. *See* Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 429, 437 (Wash. Ct. App. 1999), *aff'd*, 49 P.3d 860 (Wash. 2002) (concluding that statements in *Del Monte Dunes* limiting *Dolan* to exactions requiring dedications of land were dicta, and for that reason ignoring them); Bruce W. Bringardner, *Exactions, Impact Fees, and Dedications: National and Texas Law After* Dolan *and* Del Monte Dunes, 32 URB. LAW. 561, 582 (2000) (same).

Unsurprisingly, *Lingle* was not the first instance in which the Court has included what could be classified as dicta in its takings decisions. Most recently, the Court's decision in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), concerned only whether a temporary moratorium on development, which rendered property undevelopable, constituted a per se temporary taking for which compensation was due under *Lucas*, or instead represented merely a factor to be considered as part of a generalized inquiry under *Penn Central* into

Lingle's discussion of *Nollan* and *Dolan*'s scope will not be so easy to ignore, however. Unlike in *Del Monte Dunes*, the Court in *Lingle* thoroughly discussed the facts, legal rules, and rationale of its exactions decisions, offering its most comprehensive consideration of the exactions issues since *Dolan*. More significantly, the Court explained that, in order to settle the legal issue in *Lingle*, which required an integrated approach to the regulatory takings doctrine, it needed to explain its decisions in *Nollan* and *Dolan*.[168] Insofar as *Nollan* and *Dolan* had *appeared* to depend (but, the Court instructed, did not in fact depend) in part upon the *Agins* test that the Court was discarding, and insofar as both parties had argued in their briefs about the precise relationship between the exactions decisions and *Agins*'s "substantially advances" test,[169] the Court was required to explain how its decision would affect the viability of the nexus and proportionality tests.[170] For the Court's integrated theory of regulatory takings to cohere, it needed to provide a rationale for why *Nollan* and *Dolan* fit within this theory. Part III accomplished that goal, at least to the Court's satisfaction, and thus was central to the Court's rationale.[171] *Lingle*'s discussion of the exactions decisions is therefore best understood as a necessary step along the decisional path to its outcome and part of its holding, rather than as dicta.[172]

---

whether a taking occurred. *See id.* at 306 ("The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the Takings Clause of the United States Constitution."); *id.* at 337 ("In rejecting petitioners' per se rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other."). Nevertheless, Justice Stevens's six-justice majority decision stated unequivocally that the Court had adopted a "parcel as a whole rule" in which plaintiffs could not divide their parcel into discrete segments in order to make a regulation seem more destructive of their property rights. *See id.* at 331. This conclusion was not entirely inapposite to the question before the Court, because the *Tahoe-Sierra* plaintiffs were attempting to sever their temporal property rights in discrete segments in order to claim that a moratorium affected the entire value of their property for the period of time in which it was in place. *Id.* at 318. But the extension of the Court's narrow holding to the severance of space was neither conceptually necessary nor required for the Court to reach its result—although, ironically, it did respond to earlier dicta from Justice Scalia's decision in *Lucas*. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (suggesting that the denominator, or baseline of analysis, of the property affected in a regulatory takings claim, should be based upon "how the owner's reasonable expectations have been shaped by the State's law of property," although conceding that the issue was not before the Court). For a critical view of *Tahoe-Sierra*'s dicta, see Steven J. Eagle, *Planning Moratoria and Regulatory Takings: The Supreme Court's Fairness Mandate Benefits Landowners*, 31 FLA. ST. U. L. REV. 429, 441–47 (2004).

168. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 547–48 (2005).

169. Brief for Petitioners at 29, 33–35, 45–46, 48, *Lingle*, 544 U.S. 528 (No. 04-163); Brief for Respondent at 11–12, 18–19, 21–23, 33, 36, 40–41, *Lingle*, 544 U.S. 528 (No. 04-163).

170. As one commentator described the matter, taking away *Agins* as a foundation left *Nollan* and *Dolan* in a "precarious position." Sarah B. Nelson, Case Comment, *Lingle v. Chevron USA, Inc.*, 30 HARV. ENVTL. L. REV. 281, 290 (2006).

171. *See* Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2040–41 (1994) (arguing that a holding includes the rationale of a decision, as well as its facts and outcome).

172. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1068

If Part III of *Lingle* is not dicta, then the Court has firmly established that the factual predicates of its exactions decisions—"*adjudicative* land-use exactions . . . specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit"[173]—are material to the applicability of the nexus and proportionality tests.[174] Even if *Lingle*'s discussion of the exactions decisions is seen merely as dicta, however, lower courts must view that discussion's restatement of *Nollan* and *Dolan* as persuasive. In *Lingle*, the Court extensively explained the scope of those decisions, one aspect of which it had already declared six years earlier in *Del Monte Dunes*.[175] It may have been unclear initially that the exactions challenged in *Nollan* and *Dolan* were constitutionally suspect because of their substantive requirements and the procedure by which they were imposed. But the Court's reiteration in *Lingle* that those facts have great constitutionally significance has now made these substantive and procedural qualities appear to be the necessary threshold for heightened scrutiny.

IV. EXACTIONS, POST-2005: REGULATORY CONDITIONS IN A CONSTITUTIONAL SHADOW

Lingle failed in two respects to settle the Court's constitutionalization of exactions: it appeared to resolve live issues without a live controversy that raised those issues, and it did so without fully explaining its reasons. Part III addressed the former failure; this Part attempts to compensate for the latter. It begins by explaining why the limits the Court placed on *Nollan* and *Dolan*'s applicability in *Lingle*

(2005) (characterizing a necessary step along the decisional path as a component of a decision's holding, rather than dicta). My argument is not intended to assert that the line between holding and dictum is obvious or discernible in the abstract. The problem of identifying that line is both formal and behavioralist. The tension between a narrow, particularistic reading of the judicial text and efforts to read decisions broadly in search of a generalizable, replicable rule that can be applied in future decisions may ultimately be unresolvable, part of an ongoing jurisprudential dialectic—related and analogous to the dialectic between rules and standards, for example, a quandary that also surfaces in regulatory takings doctrine. *See* Charles W. Collier, *Precedent and Legal Authority: A Critical History*, 1988 WIS. L. REV. 771, 824–25; *cf.* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 383 (1985). And as the authors of the most recent, extremely exhaustive effort to define dicta themselves admit, any effort to identify a clear holding/dicta line will face resistance from judges who strategically employ the concept to avoid precedents they dislike or reach results they prefer. *See* Abramowicz & Stearns, *supra*, at 1093. That said, even if the line cannot be drawn in the abstract and the concepts are sufficiently indeterminate to allow bad-acting judges to willfully ignore precedent or reasonable arguments to be made on either side in difficult cases, there is sufficient content to the distinction to allow a line to be drawn in particular cases.

173. *Lingle*, 544 U.S. at 546–47 (emphasis added).

174. For summaries of the literature on the precedential value of material facts, see Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 18 n.21 (1989); Dorf, *supra* note 171, at 2036 nn.142–43.

175. *See supra* note 152 and accompanying text.

make practical sense. The first three sections of this Part describe an institutional web of local authority and restraint—including decisions made by state and local institutions, as well as by private individuals—that operates alongside the Court's formalist rules. This network is more diverse and responsive to local regulatory needs than the Court's doctrine. The final section explains how the existence and operation of this institutional web of constraints on local government discretion fits within *Lingle*'s broad restatement of the regulatory takings doctrine.

A. State Legislatures and State Courts

The Takings Clause, as enforced by federal and state courts, is not the sole restraint on local regulatory authority. In the first instance, state legislatures and courts can simply deny local governments the authority to impose exactions at all.[176] The great increase in exactions was first authorized during the 1970s and 1980s by state courts, which found implied municipal authority to impose exactions.[177] Soon thereafter, many legislatures, especially in fast-growing regions of the country, granted municipalities explicit authority to impose impact fees, with the result that their use expanded rapidly in the late 1980s and early 1990s.[178] In a number of instances, the development and real estate industries in individual states played significant roles in the drafting and passage of those states' impact fee statutes.[179] Much of the legislation focused on

176. *See generally* Mandelker, *supra* note 111, at §§ 9.18, .21 (noting that fewer than half the states have adopted legislation authorizing impact fees, and discussing state court decisions ruling on local authority to impose exactions and impact fees in the absence of clear statutory authority). Iowa, for example, has provided neither statutory nor common law authority to impose impact fees. *See* Home Builders Ass'n of Greater Des Moines v. City of W. Des Moines, 644 N.W.2d 339, 349–50 (Iowa 2002) (holding that municipalities are not authorized to levy impact fees); Madelaine Jerousek, *Who pays for growth: Developers or Cities?*, Des Moines Register, July 8, 2002, at 1A. By contrast, the California Supreme Court long ago found them authorized under state law. *See* Ayres v. City Council of Los Angeles, 207 P.2d 1, 42–43 (Cal. 1949).

177. *See, e.g.*, Contractors & Builder's Ass'n of Pinellas County vs. City of Dunedin, 370 So.2d 458 (Fla. 1976) (striking down a system development fee, but providing guidelines for an acceptable impact fee system); N.J. Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555, 557–60 (N.J. 1987) (summarizing the development of exactions as a regulatory tool and state court responses to the issue of local authority to impose them); Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DePaul L. Rev. 635, 645–70 (1990) (summarizing state court decisions on inherent local authority to impose exactions). Histories of how particular states authorized exactions demonstrate the mix of constitutional, statutory, and common law authorities through which state courts resolved challenges to municipal power to impose exactions. *See* Norman Marcus, *Development Exactions: The Emerging Law in New York State*, *in* Private Supply of Public Services, *supra* note 53, at 66.

178. *See* Been, *supra* note 34, at 141; Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 Urb. Law. 491, 491–92 & n.6 (1993); Miller, *supra* note 52, at 57. For an informative history of the evolution of exactions requiring conservation easements from an ad hoc, individualized process to one governed by state statutes, see Jessica Owley Lippmann, *The Emergence of Exacted Conservation Easements*, 84 Neb. L. Rev. 1043, 1096–1102 (2006).

179. *See, e.g.*, Miller, *supra* note 52, at 57; James van Hemert, *Nevada Development Impact Fees*, *in* Development Impact Fees in the Rocky Mountain Region, *supra* note 52, at 51.

impact fees and fees in lieu of dedication, due to their administrative advantages over dedications of land. Parcels of land and parts thereof that might be required for an exaction of land are unique (and treated as such under the common law), while impact fees appear more precisely quantitative and scientific, and the money they raise can be used more flexibly than can an immobile piece of land.[180]

State legislation has thereby become the most significant mechanism for controlling local discretion to impose exactions. The resulting statutes vary widely, reflecting a sensitivity to statewide needs, local regulatory practice, the relationship between a particular state and its municipal authorities, and state and local politics.[181] They significantly overlap in their generalities but diverge in their particulars. For example, they typically limit local authority to impose impact fees, or limit exactions to particular types of exactions, but they vary as to which types of exactions they will allow.[182] Some states authorize their local governments by statute to require land dedications for certain purposes,[183] while Massachusetts specifically forbids municipalities from requiring the

180. *See* Fenster, *supra* note 10, at 645–48. Empirical studies of exactions practices have not identified precisely how fees are typically set and what percentage are set legislatively rather than individually, but research seems to indicate that at least with respect to impact fees, the majority are constituted legislatively, frequently through formulas based on the anticipated marginal costs of each new unit. *See* Been, *supra* note 34, at 144.

181. Arizona, for example, grants a general authority for assessing development fees to cities, but specifically enumerates a limited number of facilities for which fees can be assessed. *Compare* ARIZ. REV. STAT. ANN. § 9-463.05(A) (1996 & Supp. 2006) (cities), *with id.* § 11-1102(A) (counties). *But see* Home Builders Ass'n of C. Ariz. v. City of Apache Junction, 11 P.3d 1032, 1040 (Ariz. App. Div. 2000) (suggesting that different legislative provisions do not grant cities open-ended authority to use impact fees to fund school construction costs).

182. California's exactions statutes are exceptionally broad. *See* CAL. GOV'T CODE §§ 66001–66023 (West 1997 & Supp. 2007) (Mitigation Fee Act, authorizing local agencies to require payment of fees to defray all or a portion of the cost of public facilities related to a development project); *id.* §§ 66411–66484.5 (Subdivision Map Act, authorizing local agencies to require improvements on land as condition of subdivision map approval); *id.* § 66475 (authorizing local agency to require "dedication or irrevocable offer of dedication of real property within the subdivision for streets, alleys, including access rights and abutter's rights, drainage, public utility easements and other public easements"). New Hampshire's statute is less broad than California's set of statutory authorities, but is nevertheless extensive. N.H. REV. STAT. ANN. § 674:21(V) (1996 & Supp. 2006) (enumerating an exclusive but extensive list of facilities for which impact fees can be collected). Texas has a quite complicated and elaborate statute. TEX. LOC. GOV'T CODE § 395.001(4) (Vernon 2005) (defining "impact fees" to include "a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development" and dedications of land, as well as certain types of fees for constructing and extending water mains or lines). Illinois, by contrast, only authorizes exactions for road improvements, *see* 605 ILL. COMP. STAT. ANN. § 5/5-901 (West 1993), and for school grounds, *see* 65 ILL. COMP. STAT. ANN. § 5/11-12-5(7) (West 2005); Thompson v. Vill. of Newark, 768 N.E.2d 856, 859 (Ill. App. 2002) (construing use of the phrase "school grounds" in impact fee statute narrowly to exclude impact fees for school buildings).

183. *See* MINN. STAT. ANN. § 462.358(2b) (2001 & Supp. 2007); N.Y. TOWN LAW § 277(4) (McKinney 2004).

dedication of land for a public way, park, or playground as a condition for subdivision approval without the payment of compensation.[184] Some states even delegate authority to special districts to impose impact fees on new development for the district's particular purpose.[185]

State statutes typically impose procedural requirements on local promulgation of exactions ordinances, although they vary in how they do so. A number of states, especially in the intermountain west, require the participation of private citizens in the process by which impact fee ordinances are passed, and some include explicit requirements that developers have a significant voice in that process.[186] Some statutes impose upon local governments the duty to plan comprehensively for the financing of their capital infrastructural improvements,[187] and thus passage of the comprehensive plan and its ongoing revision and amendment over time can check future local discretion.[188] Colorado has a general, explicit requirement that all exactions must be imposed pursuant to a duly adopted law, regulation, or policy, or to some adequate standard applied on a rational and consistent basis.[189] And most impact fee statutes stipulate elements or methodologies that a local government must include in its fee schedules,[190] as well as specify the means for collecting funds and accounting for their use.[191]

State legislatures typically include provisions establishing

184. MASS. GEN. LAWS ANN. ch. 41, § 81Q (West 2006). This predisposition in Massachusetts against exactions extends to the judicial review of impact fees as well. *See* Lawrence Friedman & Eric W. Wodlinger, *Municipal Impact Fees in Massachusetts*, 88 MASS. L. REV. 131, 134 (2004).

185. In the Boise area, for example, the Ada County Highway District, under Idaho state authority, began in 1992 to collect impact fees for public roads. *See* CONNIE B. COOPER, TRANSPORTATION IMPACT FEES AND EXCISE TAXES 21–23 (2000).

186. *See* ALTSHULER & GOMEZ-IBÁÑEZ, *supra* note 30, at 53–54; *see, e.g.*, IDAHO CODE ANN. § 67-8205(2) (Mitchie 2006) (requiring that every governmental entity that adopts an impact fee program appoint an advisory committee of at least five members, two of whom must be active in the land development, construction, or real estate industry); NEV. REV. STAT. ANN. §§ 278B.150(2)(a)–(b) (LexisNexis 2002) (requiring every government body imposing an impact fee to have a "capital improvements advisory committee" of at least five members, at least one of whom must represent the real estate, development, or building industry).

187. *See* N.M. STAT. ANN. § 5-8-2(P) (LexisNexis 2004); TEX. LOC. GOV'T CODE § 395.014; WASH. REV. CODE ANN. § 82.02.050 (West 2006).

188. Daniel R. Mandelker, *Planning and the Law*, 20 VT. L. REV. 657, 658–60 (1996).

189. *See* COLO. REV. STAT. ANN. § 29-20-204(2)(e) (West 2006).

190. *See, e.g.*, *id.* § 29-20-104.5(2) (requiring local government to "quantify the reasonable impacts" of the development on capital facilities, and prohibiting fees that would remedy existing deficiencies); S.C. CODE ANN. § 6-1-980 (2004) (stipulating means to calculate maximum allowable amount of impact fee, and requiring the use of "generally accepted accounting principles" in calculation).

191. *See, e.g.*, CAL. GOV'T CODE § 66006 (West 1997 & Supp. 2007) (requiring earmarking of impact fee receipts and placement of funds in separate interest-bearing accounts); COLO. REV. STAT. ANN. § 29-1-801 to 29-1-804 (similar earmarking requirement to those of California); W. VA. CODE ANN, § 7-20-8(d) (West 2006) (same); Douglas County Contractors Ass'n v. Douglas County, 929 P.2d 253, 256-57 (Nev. 1996) (striking down county's school impact fee ordinance for failing to follow state legislation that required earmarking of collected funds).

substantive standards in their statutes, in order to make certain that impact fees are fairly applied and that they promote, or at least do not hinder, other important public policy goals. At minimum, impact fee statutes impose a "reasonable relationship" test on fees that are imposed.[192] Colorado and Utah have codified the nexus and proportionality tests from *Nollan* and *Dolan* for individualized and discretionary exactions, and have extended those tests to fees as well as to required dedications of land.[193] In contrast, Washington state's supreme court has held that its state's impact fee statute specifically does not incorporate the *Nollan* and *Dolan* tests (which, the Court reasoned in dicta, do not apply to fees and may not apply to legislatively imposed exactions) and requires only that impact fees be "reasonably related and beneficial to the particular development seeking approval," while it authorizes fees that would fund area-wide infrastructure.[194] A number of statutes also protect against excessive exactions by explicitly prohibiting their use either to remedy current inadequacies in capital infrastructure or to upgrade the jurisdiction's current level of service provision and infrastructure.[195] And at least one statute requires local governments to reduce or waive a legislative impact fee for affordable housing and for economic development if it is expected to increase sales tax revenues.[196]

At the same time, state courts do more than simply enforce *Nollan* and *Dolan*. The issue of local authority to impose development conditions, which was more significant during the first (pre-*Nollan*) generation of exactions,[197] remains important for those states whose legislatures have not granted express exactions authority to local governments.[198] And, for local governments authorized to impose exactions, state courts enforce the requirements and limits imposed by state legislatures on this power.[199]

---

192. *See, e.g.*, CAL. GOV'T CODE § 66001(3)-(4) (requiring local agency seeking to impose an impact fee to find "a reasonable relationship" between the fee's use and the type of development project on which the fee is imposed" and between the need for the public facility and the type of development project on which the fee is imposed).

193. *See* COLO. REV. STAT. ANN. § 29-20-203(1); UTAH CODE ANN. § 17-27a-507 (2005); B.A.M. Dev., L.L.C. v. Salt Lake County, 128 P.3d 1161, 1168 (Utah 2006). Colorado's legislative scheme extending *Nollan* and *Dolan* to fees as well as land, but limiting their applicability to individualized exactions, codified the Colorado Supreme Court's decision in *Krupp v. Breckenridge Sanitation Dist.*, 19 P3d 687, 697 (Colo. 2001).

194. City of Olympia v. Drebick, 126 P.3d 802, 811 (Wash.), *cert. denied*, 127 S. Ct. 436 (2006).

195. *See, e.g.*, GA. CODE ANN. § 36-71-8 (West 2003); NEV. REV. STAT. ANN. § 278B.280 (LexisNexis 2002).

196. *See* N.M. STAT. ANN. §§ 5-8-3(D), 5-8-13 (LexisNexis 2004).

197. *See supra* Part I.A.

198. *See* 4 ANDERSON'S AMERICAN LAW OF ZONING § 25:24 (4th ed. 1996)

199. *See, e.g.*, Cherokee County v. Greater Atlanta Homebuilders Ass'n, 566 S.E.2d 470, 475–76 (Ga. Ct. App. 2002) (upholding an impact fee against challenge under a state statute limiting exactions to a "proportionate share" of the cost of infrastructural system improvements); Simonsen v. Town of Derby, 765 A.2d 1033, 1036 (N.H. 2000) (invalidating an impact fee imposed by a municipal planning

As with legislatures that have established similar but nevertheless distinct exactions statutes, state courts have taken disparate approaches to creating standards for reviewing exactions under state constitutional law.[200] Some courts, such as Utah's Supreme Court, have formulated complex multi-factor tests to review the extent of the burden created by an exaction.[201] Florida's Supreme Court, by contrast, has come up with a far simpler "dual rational nexus test" that has proven more influential for courts and commentators.[202] The Illinois Supreme Court continues to apply its "specifically and uniquely attributable" test for exactions,[203] which was recognized by the Court in *Dolan* as one of the strictest of the pre-*Nollan* state court standards.[204]

To illustrate the relationship between state and local government and among the several state governments, consider a recent intermediate appellate decision from Massachusetts, *Greater Franklin Developers Ass'n, Inc. v. Town of Franklin*.[205] Franklin is a fast-growing town outside of Boston that, in the mid-1990s, suffered from a shortage of schools.[206] On the advice of consultants, the town adopted an impact fee ordinance that would "'ensure[] that development bears a proportionate share of the cost of capital facilities necessary to accommodate such development and to promote and protect the public health, safety and welfare.'"[207] The town's ordinance included a schedule of fees placed on different types of housing and based upon the anticipated number of children in each type,

board because the town had failed to pass an impact fee ordinance required by state statute).

200. *See generally* Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 651–72 (2003) (surveying different state court approaches).

201. *See, e.g.*, Banberry Dev. Corp. v. S. Jordan City, 631 P.2d 899, 903 (Utah 1981) (listing seven factors that concern the burden that new development will create on existing infrastructure and the existing manner the way in which the municipality uses to finance existing capital facilities). California's Supreme Court requires the consideration of thirteen factors. *See* Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860–61 (Cal. 1997) (listing and explaining factors); Massingill v. Dep't of Food & Agric., 125 Cal. Rptr. 2d 561, 566–67 (Ct. App. 2002) (applying factors).

202. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 609–10 (Fla. Dist. Ct. App. 1983) (developing a due process-based "dual rational nexus test" that considers whether there is a reasonable connection between, first, the locality's need for additional capital facilities and the new development; and, second, the funds collected and the benefits accruing to the new development); *accord* Home Builders Ass'n v. City of Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000) (adopting dual rational nexus test); Julian C. Juergensmeyer & James C. Nicholas, *Impact Fees Should Not Be Subjected to Takings Analysis*, in TAKING SIDES ON TAKINGS ISSUES 357, 359–63 (Thomas E. Roberts ed., 2002) (arguing in favor of dual rational nexus test and its conceptual and practical superiority to *Nollan* and *Dolan*).

203. *See* N. Ill. Home Builders v. County of Du Page, 649 N.E.2d 384, 389–90 (Ill. 1995) (applying test from Pioneer Trust & Sav. Bank v. Mt. Prospect, 176 N.E.2d 799 (Ill. 1961), to review impact fee enabling statute).

204. Dolan v. City of Tigard, 512 U.S. 374, 389–90 (1994) (discussing *Pioneer Trust* test).

205. 730 N.E.2d 900 (Mass. App. Ct. 2000).

206. *Id.* at 900–01.

207. *Id.* at 901 (quoting FRANKLIN, MASS., TOWN CODE § 83-2(2)).

and required that the fees be placed in a separate fund with unused portions returned to the developer after eight years.[208] Applying a Massachusetts Supreme Judicial Court decision from 1983 that applied a very narrow definition of a user "fee" that a Massachusetts municipality could legally charge, the court in *Greater Franklin Developers* declared the ordinance invalid as an impermissible tax because the benefits of the impact fees would redound to the entire community and not just to the projected new residents.[209] As a general matter, the court reasoned, everyone profits from an educated population.[210] Furthermore, the facilities built from the proceeds of the impact fees intended for the use of future residents would at least be accessible to, and might even be enjoyed by, current residents who had contributed nothing to the facilities' expense.[211]

Relying on precedent and older decisions from other jurisdictions, the court staked out Massachusetts law as a harsh outlier, one that rejected less stringent standards like Florida's dual rational nexus test.[212] Lacking support in existing state common law and refused review by the Supreme Judicial Court,[213] the town was left to petition the state legislature for the authority to pass an ordinance imposing impact fees. To date, the Massachusetts legislature has not obliged.[214] Whether correct or foolish as a matter of policy, the state has refused to grant its municipalities broad authority to use exactions, thereby illustrating that states can and do serve as avid protectors of the interests of property owners and developers, even in the face of a general judicial and legislative shift toward expanding a general, if still limited, authority to impose exactions.

B. Local Governments, Local Ordinances

Local governments check their own discretion as well, by committing to substantive and procedural standards through local ordinances. These commitments are especially important because, even

208. *Id.*

209. *Id.* at 902 (quoting Emerson College v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984)).

210. *Id.*

211. *See id.* Thus, the school impact fee differed from the electrical service connection fee upheld in *Bertone v. Department of Public Utilities*, 583 N.E.2d 829, 836 (Mass. 1992), which was exclusively for the benefit of the new development.

212. *See* Greater Franklin Developers Ass'n, 730 N.E.2d at 903 (citing Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957) for support, and distinguishing St. Johns County v. Northeast Florida Builders Assn., Inc., 583 So.2d 635 (Fla. 1991)).

213. *See Greater Franklin Developers Ass'n*, 738 N.E.2d at 750; *see also* Friedman & Wodlinger, *supra* note 184, at 137 (arguing that Massachusetts courts should adopt Florida's dual rational nexus test).

214. *See* Patric O'Brien, Comment, *The Bizarre Journey of Impact Fees in Massachusetts: From the "Foothills of Confusion" Around the "Mountains of Ignorance" and Up Into the "Castle in the Air"—Will "Rhyme" and "Reason" Ever Be Rescued?*, 35 New Eng. L. Rev. 511, 541–43 (2001).

before *Lingle*, exactions that were imposed by legislation or that imposed monetary exactions could avoid the constitutional nexus and proportionality rules, depending on how the relevant state courts had interpreted *Nollan* and *Dolan*.[215] Whether passed because of a state legislative mandate or because of a decision to commit legislatively to particular regulatory practices, these ordinances represent an important self-imposed check on local regulatory discretion.

Due in part to differences among state exactions statutes, as well as to their unique regulatory needs, politics, and commitment to regulation, such ordinances vary widely.[216] Consider the exactions ordinances of several fast-growing mid-sized cities, that ranked at the top of recent reports tracking patterns of domestic migration.[217] These ordinances, and the regulatory practices they limit and direct, show similar patterns and important divergences. Fayetteville, Arkansas and Austin, Texas, for example, have promulgated a somewhat similar, limited set of enumerated exactions ordinances despite significant distinctions between their state impact fee statutes.[218] Arizona's impact fee statute provides

215. *See supra* text accompanying notes 96–103.

216. On the reasons why local jurisdictions are likely to vary in their desire and ability to impose exactions, see Been, *supra* note 34, at 151–52.

217. The small sample that follows is based on cities that appeared at the top of the 2004 and 2005 U-Haul National Migration Trend Report, which tracks growth areas for families that transacted with U-Haul during a calendar year. *See* Press Release, U-Haul, Int'l, Inc., U-Haul Ranks Austin, Texas and Boise, Idaho Top 2005 Growth Cities (Apr. 14, 2006), *available at* www.uhaul.com/pr/publication.ashx?id=9633 [hereinafter 2005 Report]; Press Release, U-Haul, Int'l, Inc., U-Haul Ranks Fayetteville, Arkansas and Boise, Idaho Top 2004 Growth Cities (Feb., 21, 2005), *available at* www.uhaul.com/pr/publication.ashx?id=6071 [hereinafter 2004 Report]. This does not purport either to represent a scientific sample of cities, nor—because it includes neither counties nor special districts—of the range of municipal exactions ordinance. Instead, this is merely intended to serve as a snapshot of several fast-growing cities located in different states and regions in order to demonstrate the variance among cities that adopt exactions ordinances.

In U-Haul's 2004 survey of cities with more than ten thousand families moving, Fayetteville, Arkansas finished first, Austin, Texas finished third, and Mesa, Arizona finished fourth. 2004 Report, *supra*. In the 2005 survey, Austin finished first and Aurora, Illinois finished second. 2005 Report, *supra*. In U-Haul's 2004 and 2005 survey of cities with between 5000 and 10,000 families moving in, Boise, Idaho finished first both years and Victorville, California finished second in 2005 and fourth in 2004. 2005 Report, *supra*; 2004 Report, *supra*. Des Moines, Iowa, which finished third in the five-to-ten thousand category in 2005 and second in 2004, 2005 Report, *supra;* 2004 Report, *supra*, is prohibited by the state constitution from imposing impact fees, and to date has not received authorization from the state legislature to pose them. *See supra* note 176.

218. Fayetteville's city code imposes impact fees for water and wastewater impacts, police and public safety system impacts, and fire safety system impacts, many of which were adopted only recently after the state legislature granted municipalities explicit authority to impose impact fees. FAYETTEVILLE, ARK., CITY OF FAYETTEVILLE UNIFIED DEVELOPMENT CODE §§ 159.02, .03, .04 (2005). The state passed an impact fee statute in 2003, *see* ARK. CODE ANN. § 14-56-103 (2005), although its state supreme court has found police power authority for fees that are fair and reasonable and that bear a reasonable relationship to the benefit to recipients of the improved service. *See* City of Marion v. Baioni, 850 S.W.2d 1, 2 (Ark. 1993). More than two decades ago, the Arkansas Supreme Court struck down an early impact fee that Fayetteville had imposed for parks and park facilities on the grounds that the city had not planned sufficiently to justify the developer's contribution and had failed to

more authority to local governments to set impact fees,[219] and the city of Mesa's impact fee ordinance collects a far broader range of fees, ranging from water and wastewater to public safety and fire safety, and including parks, cultural facilities, and libraries.[220] And despite Illinois' heightened judicial scrutiny of exactions,[221] the city of Aurora includes a significant range of exactions in its code, including the dedication of land for schools and parks, and a variety of fees.[222] A number of these cities offer exemptions from impact fees for certain types of development, including affordable housing.[223]

Local governments frequently adopt substantive standards in their ordinances that reflect an understanding of the Supreme Court's quantitative and qualitative exactions tests. The proportionality issue is clearest in impact fee ordinances, which typically operate formulaically through a schedule of fees or some generally applicable calculation whose methodology is specified in the ordinance itself.[224] They thereby attempt to meet state legislative requirements and frequently adopt the constitutional requirements for the proportionality test under *Dolan* (or a relatively equivalent standard), while offering a gloss of mathematical precision and fairness. Because of the development in disciplines such as traffic engineering, some types of anticipated impacts lend themselves more clearly to formulas and as such are more widely adopted as subject matter for impact fees.[225] Localities also legislate qualitative standards

provide for a refund in the event that the parks were not developed. *See* City of Fayetteville v. IBI, Inc., 659 S.W.2d 505, 507–08 (Ark. 1983).

Austin's city code imposes water and wastewater impact fees on subdivisions, AUSTIN, TEX., AUSTIN CITY CODE § 25-9-324 (2006), and parkland dedication requirements, *id.* § 30-2-214. The Texas impact fee statute is significantly older than Arkansas's and much more complicated. TEX. LOCAL GOV'T CODE §§ 395.001–.080 (2006); *see also* MANDELKER, *supra* note 111, § 9.21 (characterizing Texas statute as "[o]ne of the most elaborate impact fee statutes").

219. *See* ARIZ. REV. STAT. § 9.563.05 (1996 & Supp. 2006); *see also* Douglas A. Jorden & Randal W. Studer, *Arizona Development Impact Fees*, *in* DEVELOPMENT IMPACT FEES IN THE ROCKY MOUNTAIN REGION, *supra* note 52, at 1–4 (describing history of Arizona statute authorizing cities to levy impact fees and characterizing the use of fees in the state as "common").

220. MESA, ARIZ., MESA CITY CODE § 5-17-5(A) (2006).

221. *See supra* text accompanying note 204.

222. AURORA, ILL., AURORA CITY CODE § 43–56 (2006) (requiring dedication of land or payment of a fee in lieu of dedication for schools "to serve the immediate and future needs of the residents of the development as a condition of subdivision approval"); *id.* § 23–11(1) (requiring parkland dedication); *id.* §§ 23-16, -17, -18 (impact fees for public works, the fire department, and school development).

223. AUSTIN CITY CODE § 25-9-347; BOISE CITY CODE § 4-12-08(B); CITY OF FAYETTEVILLE UNIFIED DEVELOPMENT CODE § 159.02(D)(4), 159.03(D)(4), 159.04(D)(4).

224. *See, e.g.*, MESA CITY CODE § 5-17, Tables 1–7 (detailing a schedule of impact fees); BOISE CITY CODE § 4-12-13(F), (G), (H) (providing methodology for park impact fee schedule, and allowing for individual assessment where the fee payer can demonstrate by clear and convincing evidence that the established impact fee is inappropriate).

225. *See* COOPER, *supra* note 185, at 9-15 (summarizing study of sixteen jurisdictions' transportation impact fees and taxes, and identifying the formulaic basis of the methodologies most use, which includes a manual produced by the Institute of Transportation Engineers). Traffic is also typically a

that parallel *Nollan*'s nexus test (without always adopting its rigor), frequently by incorporating a relevant state standard that requires a relationship between the exaction and the impact that the development is expected to cause.[226]

Although similar to each other, these ordinances demonstrate no clear substantive pattern. Local government ordinances do not necessarily exercise the full extent of potential municipal authority under state law. Rather than using their authority to maximize leverage, municipal legislative practices reflect the exigent and contingent political realities that the local legislature faced when the ordinances were passed. And, although they bind themselves by ordinance, their actual practices may vary widely—perhaps by requiring additional exactions beyond those stated in local legislation, and perhaps, too, by exacting money or land at other points in the development process.[227]

C. JURISDICTIONAL COMPETITION, PRIVATE DECISIONS

As numerous commentators have argued, the competitive market between jurisdictions for attracting residents, businesses, and industry disciplines local governments that otherwise might exploit property owners through excessive exactions.[228] Across the country, within a region, and even in a metropolitan area, local governments compete with each other for residents by offering a package of taxes, services, and amenities; individuals, businesses, and industry respond as market participants by moving into and away from jurisdictions based on their preferences.[229] Although real property is a fixed resource and cannot be moved between jurisdictions (except insofar as the jurisdictional borders are unstable), new entrants arrive and purchase property and existing residents depart and sell property based in part on their response to actions taken and signals sent by local governments. Such actions and signals include the regulation of land use. Local governments with high proportions of valuable residential housing tend to perform a "race to the top" of environmental control and planning. They do so because such regulation is politically popular among homeowners seeking to protect the values in their property by limiting the risk of local and

matter of great public concern. *Id.* at 11.

226. *See, e.g.*, AURORA CITY CODE § 23-18(a) (school development fees must cover only a "proportionate share" of costs); BOISE CITY CODE §§ 4-12-05, -06 (2006) (requiring that exactions impose a "proportionate share" of costs); VICTORVILLE, CAL., VICTORVILLE MUNICIPAL CODE § 15.04.060(b) (2006) (requiring that the city council demonstrate a "reasonable relationship" between impact fees and new development).

227. *See supra* note 111.

228. FISCHEL, *supra* note 36, at 39–97; Been, *supra* note 29, at 475; Fennell, *supra* note 14, at 53–54, 56-58.

229. *See* FISCHEL, *supra* note 36, at 58–63; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

neighborhood change.[230]

Accordingly, municipal decisions to exact property and money in the development of land, with their attendant effects on the value of existing and proposed new development, take place within a market-like system.[231] Regulatory decisions about whether and to what extent a jurisdiction imposes exactions on new development will affect property values throughout the community, levels of participation in local politics and the results of local elections, and, ultimately, entry into and exit from the community.[232] The threat of homeowner disaffection is at once public—insofar as it can result in political changes to the composition of the elected bodies that preside over land use regulation—and private—insofar as individual decisions to exit affect the composition of communities and the values of property within them.[233]

The discipline that competing jurisdictions provide is not perfect. Local governments can exploit their monopoly of police power authority within their jurisdiction, while individual homeowners have immobile assets. Moreover, one group that could be harmed by excessive exactions, potential homebuyers, are frequently not citizens of the community that imposes the exactions that affect them.[234] Interjurisdictional competition can also create significant distributive problems, insofar as the consumers of local public goods have vastly different financial resources and mobility, and people's preferences for living near and pooling resources with those of similar demographics and resources can impact the quality of a jurisdiction's public goods.[235] And the Tiebout model itself fails to capture both the complex and dynamic internal operations of local governments and the extent of their authority—issues that affect both the exactions that a municipality can impose and the bureaucratic practices and politics that it actually does impose.[236] Nonetheless, the dynamics produced by market-like public and private behavior provide a further brake on local discretion to impose exactions.

---

230. FISCHEL, *supra* note 36, at 3–10.

231. *See* Rose, *supra* note 35, at 886.

232. *See id.* at 882–87 (adapting ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) to the political economy of local land use regulation).

233. Indeed, the relationships between political voice and exit, and between the putatively private concerns of community composition/property values and the putatively public concerns of electoral politics, demonstrate the meaninglessness of the public/private distinction itself.

234. *See* Sterk, *supra* note 47, at 832.

235. Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 663 (2002) (reviewing FISCHEL, *supra* note 36).

236. Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 400-01 (1990).

D. *LINGLE*, EXACTIONS, AND THE COURT'S INSTITUTIONALIST FOCUS

This complex mix of institutional oversight, which includes but is not defined by the constraints imposed by the Takings Clause, explains why *Lingle* commands a narrow application of *Nollan* and *Dolan*. *Lingle* recognized the problems caused when the judiciary relies upon the limited authority provided by the Takings Clause to engage in heightened scrutiny of substantive, discretionary regulatory decisions. *Lingle*'s institutionalist focus sets forth a mixture of hard rules and deferential standards that invite searching judicial review in factual circumstances when competent institutions appear to have overstepped their constitutional authority by confiscating property. When those facts are not in evidence, the Constitution requires a far less rigorous balancing of indeterminate factors. In those latter instances, local administrative agencies are sufficiently competent, and sufficiently overseen by external political institutions, to deserve deference. *Lingle* extended this approach to its exactions decisions by narrowing the application of the Takings Clause only to exactions that strongly suggest the government has overstepped its authority. In the absence of facts creating that inference, other institutions can more competently provide the less strenuous oversight required to check local discretion.

In *Lingle*, the Court failed to specify why these other institutions are especially competent and worthy of deference in the specific context of exactions. But in *Lingle* and in the other takings decisions from the 2004 Term, the Court explained why local institutions applying state and local law are more competent than courts applying the Takings Clause.[237] In those decisions, all of which concerned property owner challenges to local regulatory programs, the Court invoked the need for courts to defer to a "carefully formulated" effort to plan comprehensively.[238] Likewise, it warned against substituting a judicial judgment for one reached through politically accountable institutions,[239] and it preached respect and "comity" to state courts.[240] It suggested that property owners frustrated by the actions of their local governments could seek political solutions through their state governments.[241] And the Court sought explicitly to match the proper formal test to the degree of deference that lower courts should give the decisions of political and administrative agencies: Strong takings rules are intended to focus heightened scrutiny on a narrowly defined set of actions likely to lead to government rent-seeking and exploitation, while deferential standards allow no more than a relatively cursory review of actions where the agencies are likely to have more

237. The discussion that follows summarizes Fenster, *supra* note 25.

238. *E.g.*, Kelo v. City of New London, 545 U.S. 469, 483 (2005).

239. *See* Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 541–44 (2005).

240. San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 345 (2005).

241. *See Kelo*, 545 U.S. at 489.

expertise than courts.[242]

In light of these general arguments, the justification for the Court's implicit assumption about the desirability of other forms of institutional oversight in the exactions context would be as follows. As this Article has explained, local governments have been imposing exactions since before the Court intervened in *Nollan* and have continued to do so, both under *Nollan* and *Dolan*'s commands and in their shadow, for more than a decade now. They have been doing so with oversight from a web of local and state institutions which provides property rights protections that are less uniform but more sensitive to local circumstance and political culture. These diverse elements enable greater interplay among levels of government and public and private actors, more creativity and expertise in devising and responding to regulatory strategies, and more checks and balances between state actors and the forces that constrain state action. The resulting regulatory practices have varied in effects and effectiveness, but they nevertheless engender creativity in developing and checking the use of exactions where locally appropriate regulatory oversight is most available and valuable: in state and local legislatures and in state courts applying state law.

The institutional web allows both a strong measure of local discretion on the regulatory ground, and a complex set of institutional constraints that operate ex ante and ex post. It thus affirms, in the first instance, the localist emphasis in land use control.[243] As political theorists from a broad array of traditions and normative perspectives have argued, local government located within a decentralized system of governance offers numerous advantages and boasts numerous virtues. A liberal, Tocquevillean localism views decentralization as an instrumental means to educate and develop self-governance;[244] a Brandeisian localism (derived from his characterization of states in a federalist system) views decentralization as a source of innovation and experimentation;[245] a Tieboutian localism views decentralization as a means to maximize effective market competition in jurisdictions and to enable individual choice;[246] and a civic republican, communitarian, or radical vision of decentralized localism views a small-sized, accessible, and responsive

242. *See Lingle*, 544 U.S. at 537–39, 545–47.

243. *See* Marc R. Poirier, Federalism and Localism in *Kelo* and *San Remo* (July 23, 2006) (unpublished manuscript, on file with author).

244. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 61 (Henry Reeve trans., 1987); Roderick M. Hills, Jr., *Is Federalism Good for Localism? The Localist Case for Federal Regimes*, 21 J.L. & POL. 187, 188–91 (2005).

245. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

246. *See supra* text accompanying notes 228–33.

state as the government form most likely to enable a participatory democracy and lively public sphere.[247] Limiting federal constitutional constraints when other institutions demonstrably can provide more effective oversight thus encourages a dynamic, more effective type of local governance.

But excessive decentralization and local governmental autonomy can prove dangerous, not only to the autonomy and well-being of a municipality's own citizens but also to the autonomy and well-being of other jurisdictions and their citizens (through, for example, spillover costs). Accordingly, higher levels of authority are essential to preserve not only individual and regional well-being, but also local autonomy itself.[248] That higher level of authority need not be the federal constitution—it can be state governments that exercise control through traditional areas of state constitutional, statutory, and common law. State laws, defining and limiting both private property rights and municipal government powers, offer a powerful, longstanding bulwark against government oppression. At the same time, state laws and institutions in a federalist system offer many of the same normative and instrumental advantages over federal authorities as local governments offer over federal and state authorities.[249] The overlapping layers of oversight in imposing exactions, from state statutes and common law to self-limiting local ordinances and the market-like activity of private individuals, demonstrate the advantage of a complex system of federalist governance in which institutions can expand or recede in importance as regulatory needs and oversight competencies develop.[250]

Viewed this way, institutions and authorities that have classically been viewed as oppositional dualities—such as legislative/judicial, constitutional/statutory, federal/state, state/local, and public/private—can operate in conjunction rather than in opposition. This is precisely the advantage of allowing the Court's constitutional rules over exactions to recede when it is unnecessary to check local discretion. The world of land use regulation has become significantly more complicated and

247. *See* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 494 (1999); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1067–73 (1980); Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 218 (1996).

248. *See* Barron, *supra* note 40, at 385–89.

249. On the advantages of a federalist approach to the regulatory takings doctrine, see Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 490–93 (2000); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 WM. & MARY L. REV. 301, 327 (1993); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 270-71 (2004).

250. *See, e.g.*, Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IOWA L. REV. (forthcoming 2007) (advocating development of state common law regulation in the shadow of federal statutes).

sophisticated over the past three decades, as states have involved themselves more in local planning, state and local governments have become more active in environmental protection, and all levels of government, along with private entities, have become more accustomed to operating together in land use regulation and development.[251] This movement has recently led the land use scholar David Callies—who co-authored a 1971 book describing the "quiet revolution" in land use regulation that advocated stronger checks on local discretion[252]—to narrate a positive trajectory in which federal constitutional, state, and local laws and agencies combine to provide more effective and reasonably fair land use and environmental controls.[253] Callies suggested that the Supreme Court's invigoration of the regulatory takings doctrine helped to bring this complex system into being.[254] In the context of exactions, *Nollan* and *Dolan* may well have served a significant role in spurring development of more, and more sophisticated, institutional implementation and oversight of exactions. But those decisions were themselves imperfect and have had adverse consequences. Under the Court's general approach to regulatory takings, as announced and described in *Lingle*, the protections of *Nollan* and *Dolan* need apply only in a limited fashion; an institutional web, operating in those decisions' constitutional shadow, can ultimately provide better, more responsive oversight.

One final note on the Court's debatable but confident line-drawing: The factual distinctions upon which *Lingle* relies to demarcate the limits of *Nollan* and *Dolan*'s applicability are neither stable nor entirely coherent. The line between legislative and adjudicative regulation frequently dissolves at the local level where elected officials, who have less expertise than the typical federal and state administrative agency, make both legislative regulatory commands and administrative regulatory decisions, and where the legislative process is more subject to the political process failures of majoritarianism and factionalism.[255] And the line between real and personal property similarly appears arbitrary and does not emanate from the bare constitutional text, as the confiscation of a thing rather than of land appears to its owner to be no

251. *See* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING, AND ENVIRONMENTAL SYSTEMS 209–52 (1999); Charles M. Haar, *The Twilight of Land-Use Controls: A Paradigm Shift?*, 30 U. RICH. L. REV. 1011, 1030–32; John R. Nolon, *In Praise of Parochialism: The Advent of Local Environmental Law*, 26 HARV. ENVTL. L. REV. 365, 386–410 (2002).

252. *See* FRED BOSSELMAN & DAVID L. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1971).

253. *See* David L. Callies, *The Quiet Revolution Redux: How Selected Local Governments Have Fared*, 20 PACE ENVTL. L. REV. 277 (2002).

254. *Id.* at 278.

255. *See* sources cited *supra* note 101.

less a "taking" of "property."[256]

For better or worse, however, these distinctions are longstanding, and the Court appears to be so confident of their meaning and stability that it has to date failed to mount a serious effort to justify them.[257] Commentators may, and likely will, continue to wax indignant over them.[258] But more important than its tendency to draw constitutional lines by *ipse dixit* is the Court's consistent effort to provide workable rules that offer meaningful, but limited, constitutional protection of property rights. In limiting the reach of *Nollan* and *Dolan*, the Court considers the relative probability of a taking and attempts to offer both a measure of formal protection and a hard limit on that protection's reach,[259] just as the Court has done with its other categories of regulatory effects that receive heightened scrutiny—permanent physical invasions and total diminutions of value.[260] The Court's exercises in line-drawing in

256. *See* Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227 (2004); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1151–52 (1993); Sax, *supra* note 69, at 1441 n.48.

257. The legislative/adjudicative distinction in administrative law dates back at least to the early twentieth century. *See* Bi-Metallic Investment Co. v. State Bd. of Equalization of Colo., 239 U.S. 441 (1915) (finding a tax levied on all taxable property in the city of Denver to be sufficiently general to be considered a form of legislative rule-making); Londoner v. Denver, 210 U.S. 373 (1908) (finding a tax levied on a small number of property owners was insufficiently legislative and the property owners were due individualized hearings to challenge the tax as it was levied on their property). The Supreme Court's obsession with the special qualities of land ownership, which it casts in deeply historical terms, has been essential to its invigoration of the regulatory takings doctrine. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992) (proclaiming a special protection for land in "our constitutional culture").

258. The most recent of such effort is Haskins, *supra* note 164, which largely ignores *Lingle*'s discussion of the exactions decisions. *See id.* at 519–21. Haskins applies an Epsteinian/natural rights approach to the Court's dualities in order to conclude, with indignant vehemence, that "courts should not artificially provide a method for governments to avoid the constitutionally mandated results of their land policies." *Id.* at 522. Not only does he fail to explain how the bare text of the Fifth Amendment *mandates* "proportionality" and "nexus," but he presumes throughout that the Court has adopted or should adopt the understanding of expansive, unified constitutional property rights for which Richard Epstein advocated two decades ago. *See id.* at 505–09 (relying on RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985)). Unfortunately for Haskins's argument, not only has the Court refused to share his (and Epstein's) conception of property, but the Court in *Lingle*, and throughout all three of its takings decisions in the October 2004 Term, held that the legal process by which property rights are considered by local governments makes a constitutionally significant difference. *See* Fenster, *supra* note 25.

259. On the limited formal properties of the Court's takings categories, see Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1622, 1628 (1988); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1700 (1988).

260. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (finding that a regulation that denies an owner "all economically beneficial uses" of her land effects a per se taking); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (holding that a permanent physical invasion of property effects a taking). In his dissent in *Lucas*, Justice Stevens criticized the majority's line between so-called total takings, which receive a form of strict scrutiny, and takings that merely diminish the property by 95%. *See Lucas*, 505 U.S. at 1064 (Stevens, J., dissenting). Writing for the majority, Justice Scalia's response was not particularly impressive: "Takings law is full of these 'all-or-

its takings jurisprudence may not be entirely persuasive as a matter of formal logic, but over time their distinctions have calcified into accepted constitutional common law doctrine. And, significantly, lower courts are capable of making fine distinctions when factual circumstances blur the lines the Court has drawn.[261] In order both to protect property owners and to restrain judicial intervention under the Takings Clause, the Court in *Lingle* has added another such distinction to its imperfect arsenal.

CONCLUSION

The implication of *Lingle* for exactions jurisprudence, then, is that *Nollan* and *Dolan* apply only to a narrow subset of conditions. More broadly, *Lingle* authoritatively declares the narrow, if still occasionally powerful, reach of the regulatory takings doctrine. Lower courts seem untroubled by the task of applying the decisions, albeit in a limited manner, as the few reported appellate decisions on exactions since *Lingle* demonstrate a small but discernible trend toward adopting the Court's dicta as suggestive, if not binding. The Washington Supreme Court, for example, in evaluating whether the state's impact fee statute incorporates the *Nollan* and *Dolan* tests, concluded that *Nollan* and *Dolan* do not apply either to impact fees or to legislatively imposed exactions.[262] The Federal Circuit has held that for *Nollan* and *Dolan* to apply to a development condition requiring the property owners to commit identified acres of their property to wetlands in order to mitigate the destruction of other wetlands, the government must take the owners' right to exclude.[263] Consistent with this limited reading of the exactions decisions' reach, a Wisconsin intermediate appellate court has held that *Dolan*'s requirement of an "individualized determination" precludes a facial challenge to a legislatively-imposed exactions program, because no

---

nothing' situations." *Id.* at 1019 n.8. Nor is the permanent physical invasion immune from criticism. *See* Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J.L. & JURISPRUDENCE 217, 224–28 (1993).

261. *See, e.g.*, Norman v. United States, 429 F.3d 1081, 1089–90 (Fed. Cir. 2005) (distinguishing between exactions in which government requires a property owner to dedicate the right to exclude the public, to which *Nollan* and *Dolan* apply, from exactions banning the property owner from developing wetland property without forfeiting right to exclude, to which *Nollan* and *Dolan* do not apply); Smith v. Town of Mendon, 822 N.E.2d 1214, 1219 (N.Y. 2004) (distinguishing between non-possessory exactions, to which *Nollan* and *Dolan* do not apply, and fees in lieu of dedications, to which they do); Dudek v. Umatilla County, 69 P.3d 751, 755–56 (Or. Ct. App. 2003) (distinguishing a legislatively adopted exaction scheme where the ordinance grants discretion to the county to determine the extent of the exaction, to which *Nollan* and *Dolan* apply, from a legislatively determined impact fee charge, to which they do not).

262. City of Olympia v. Drebick, 126 P.3d 802, 808 (Wash.), *cert. denied*, 127 S. Ct. 436 (2006). Accordingly, municipalities in Washington need only require that the impact fees they impose are "reasonably related and beneficial to the particular development seeking approval," and may include fees that would fund area-wide infrastructure. *Id.* at 811.

263. *Norman*, 429 F.3d at 1089–90.

property owner would as yet have been denied such a determination.[264]

Although neither entirely coherent nor pleasing to advocates on either side of the regulatory divide, *Lingle* recognizes the limited nature of the Takings Clause and the finite ability of courts applying the regulatory takings doctrine to complex, localized land use disputes. *Nollan* and *Dolan* have had an uneven and uncertain effect on land use regulation. *Lingle* attempted to clarify why and how those decisions fit within the regulatory takings doctrine. It will limit their direct effects and thus should help other institutions to more effectively perform their roles in helping to direct and improve the necessary exercise of local discretion.

264. *See* Wis. Builders Ass'n v. Wis. Dept. of Transp., 702 N.W.2d 433, 448 (Ct. App. Wisc. 2005). In *Wisconsin Builders*, the challenged administrative scheme allowed a property owner to receive a "special exception" if the condition on development, which prohibited structures and improvements within a setback area adjacent to an existing road, would result in "practical difficulty or unnecessary hardship . . . and [is] not contrary to the public interest," and which protected the DOT from providing compensation if any improvements in that area are later damaged if the land were taken for road widening. *Id.* at 436.

***